(21,429.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 107.

CHARLES H. MERILLAT AND MASON N. RICHARDSON, TRUSTEES, APPELLANTS,

vs.

MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, AND PARK AGNEW.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1910.

1 In the Court of Appeals of the District of Columbia.

No. 1879.

CHARLES H. MERILLAT et al., Appellants,
vs.
MELVILLE D. HENSEY et al.

Supreme Court of the District of Columbia.

Equity. No. 26989.

CHARLES H. MERILLAT, MASON N. RICHARDSON, Trustees, Complainants,
vs.
MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, PARK AGNEW, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill.

Filed April 9, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

Eq. No. 26989.

CHARLES H. MERILLAT, MASON N. RICHARDSON, Trustees, Complainants,
vs.
MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, PARK AGNEW, Defendants.

To the Supreme Court of the District of Columbia, holding an Equity Court for said District:

The bill of complaint of the above-named complainants respectfully represents as follows:

1. That they are citizens of the United States and residents of the District of Columbia, and they bring this suit, as trustees, by
2 virtue of a decree in Equity Cause No. 24,084, in the Supreme Court of the District of Columbia, and the supplemen-

tal order of the Court passed therein, June 5, 1906, and which are hereby referred to as part hereof.

2. That the defendants are all citizens of the United States and residents of the District of Columbia, except the Mercantile Trust Company, which is a corporation doing business in the District of Columbia. That the defendant Mercantile Trust Company is sued as the judgment debtor of Melville D. Hensey, one of the defendants hereto, and the defendant Melville D. Hensey is sued as the judgment debtor of your complainants, trustees, as hereinafter stated, and the defendants Frederick A. Mertens and Park Agnew are sued as the assignees of a certain judgment hereinafter referred to from the said defendant Melville D. Hensey, which assignment was in fraud of the rights of your complainants and of the creditors of Melville D. Hensey as hereinafter stated.

3. That heretofore, to wit: on the 21st day of May A. D. 1906, your complainants, as such trustees, recovered a decree in Equity, in the Supreme Court of the District of Columbia, against the said defendant, Melville D. Hensey, among other things for the sum of $13,887.85, and the further sum of $53,819.17, with execution thereon awarded as at law. That heretofore, to wit: on the first day of June 1906, execution was issued upon said decree as at law, and the same on the said first day of June, 1906, was by the Marshal of the District of Columbia, returned *"nulla bona,"* all which will appear by a short copy of said writ of *fieri facias,* a copy whereof is hereto attached and marked as complainants' Exhibit "A." That said defendant Melville D. Hensey has no property so far as complainants are advised subject to execution at law, from which satisfaction of said decree can or could be realized and that no part of said decree or money award thereof has been paid by said Melville D. Hensey.

4. That heretofore, to wit: on the 12th day of June, 1905, the said Melville D. Hensey, in a suit at law entitled Melville D. Hensey, plaintiff, *v.* The Mercantile Trust Company, a corporation, defendant, in the Supreme Court of the District of Columbia, and being No. 44,822, recovered a judgment against the said defendant in said law suit, The Mercantile Trust Company, being the same Mercantile Trust Company defendant hereto, for the sum of eight thousand and four hundred and sixty eight dollars together with costs of suit, and an award of execution as at law. That said judgment and no part thereof has been paid, but the same is wholly unsatisfied, and said judgment stands unreversed.

5. That being the owner of said judgment, against the said Mercantile Trust Company, Corporation, the said defendant Melville D. Hensey, who then and long prior thereto had been indebted to your complainants and other persons, and who was also then insolvent, in fraud of the rights of your complainants and of his creditors, and for the purpose of hindering, delaying and defrauding them and defeating the just claims of his creditors, and without consideration, in whole or in part, as your complainants are informed and believe,

3 and so believing aver, assigned all his right, title, and interest in said judgment as of record, to the defendants the said Frederick A. Mertens and the said Park Agnew, and said

assignment of record was made on or about the 3d day of March, 1903. Your complainants are informed and believe and so believing aver, that if either said Mertens or Agnew or both of them had any claim against the said Melville D. Hensey, the true and exact amount of the indebtedness justly due by said Melville D. Hensey to them or either of them, was and is far below the amount of said judgment, and that said entire judgment was conveyed or assigned by said Melville D. Hensey to them upon a secret agreement and arrangement that they shall refund or repay to him the amount thereof, in excess of the claim of them or either of them against him.

Wherefore, the premises considered your complainants are advised that in equity they are entitled to have said assignment set aside, and the amount of said judgment paid into the registry of this Honorable Court, to be applied upon complainants' judgment against him, and in satisfaction of the claims of all his creditors against said judgment, and they therefore pray:

1. That the defendants Melville D. Hensey, Frederick A. Mertens and Park Agnew, and the Mercantile Trust Company, be made defendants hereto, and served with process and required to answer the exigencies of this bill, answer from said Melville D. Hensey under oath being hereby expressly waived.

2. That the defendants Frederick A. Mertens and Park Agnew be required to answer under oath and to disclose the amount by them paid, if any, upon the assignment of said judgment to them, and the arrangement or agreement between them, in respect of the repayment to Melville D. Hensey of the balance or amount over and above their claim, if any. And that said defendants Frederick A. Mertens and Park Agnew and Melville D. Hensey be further required to answer specifically the interrogatories to them propounded and hereunto annexed, answer under oath being waived as to said Melville D. Hensey.

3. That the defendant the Mercantile Trust Company be required to pay the judgment obtained by the defendant Melville D. Hensey against it into the registry of the Court, there to await the final determination of the Court as to the parties entitled thereto. That the defendants Frederick A. Mertens and Park Agnew be restrained and enjoined finally and *pendente lite* from receiving the amount of said judgment and from paying the same to said Melville D. Hensey or any part of said judgment or to any one upon his order.

4. For such other and further relief as the nature of the case may require and to Equity seem proper and just.

CHARLES H. MERILLAT,
MASON N. RICHARDSON,
Trustees, Complainants.

____ ____,
____ ____,
Solicitors.

4 DISTRICT OF COLUMBIA, *To wit:*

I, Charles H. Merillat, on oath say I have read the aforegoing bill by me subscribed and know the contents thereof and that the facts

therein stated on information and belief I believe to be true, and the facts therein stated as true are true.

CHARLES H. MERILLAT.

Subscribed and sworn to before me this 9th day of April, 1907.

J. R. YOUNG, *Cl'k,*
By F. E. CUNNINGHAM, *Ass't Cl'k.*

Interrogatories to be Answered by Melville D. Hensey.

1. When did you first become indebted to Park Agnew or Frederick Mertens or either or both of them on account of the matters or things as to which you have made an assignment to them?
2. What was the amount of your indebtedness to either or both of them at the time of your assignment to them of your claim against the Mercantile Trust Company?
3. What was that indebtedness for?
4. With whom was the debt contracted? If with a firm state who were the members of the firm?
5. State fully what if any agreement or arrangement there was between you and Park Agnew or Frederick Mertens or either or both of them, or any one representing them or either of them prior to the time the assignment was made. If the agreement or understanding was reached between you and any person representing either Park Agnew or Frederick A. Mertens or both of them state who that person was and whom he represented.
6. Was there any correspondence between you and either Park Agnew or Frederick Mertens or the firm of Mertens and Agnew, or any one representing them or either of them or said firm at or prior to the time of making the assignment. If so incorporate the original correspondence in your answer to this question.
7. Was there any agreement or understanding put in writing as to what should be done with the proceeds of any judgment you might obtain? If so, incorporate said written agreement in the original in your answer to this question.
8. Did A. A. Birney, Esq., or Henry Woodward, Esq., or the firm of Birney and Woodward represent Park Agnew or Frederick Mertens or the firm of Mertens and Agnew in the proceedings or transactions leading up to your making the assignment of your claim against the Mercantile Trust Company?
9. Was there any agreement and if so what as to who would bear the expense of the litigation against the Mercantile Trust Company.
10. What if any agreement was there and by whom had with the firm of Birney and Woodward as to the conduct of your suit, against the Mercantile Trust Company. If the agreement was in writing, set it forth in full in your answer hereto.

5 *Interrogatories to be Answered by Park Agnew.*

1. Are you or were you a member of the firm of Mertens & Agnew.
2. Who composed that firm at the time of the assignment by Mel-

ville D. Hensey of his claim against the Mercantile Trust Company to yourself and Frederick Mertens.

3. For and on account of what if any claim or demand against him did Melville D. Hensey make the aforesaid assignment.

4. What was the amount of that claim or demand and how did it arise.

5. Was the demand or claim a demand or claim of yourself and Frederick Mertens individually or of the firm of Mertens and Agnew.

6. If your answer to question No. 5 be that it was a firm debt state why the assignment was made to yourselves individually.

7. Who was and are your attorney or attorneys in the matter of the claim of or demand against Melville D. Hensey on account of which said Hensey assigned his claim against the Mercantile Trust Company to you.

8. Was there any correspondence between you and Melville D. Hensey, directly or indirectly leading up to said assignment and if so set it forth in full in the original.

9. Has there been any correspondence between you and Melville D. Hensey, directly or indirectly since said assignment in relation thereto or in relation to your claim against him. If so set it forth in full in the original.

10. What was the agreement between you and Melville D. Hensey under which the said assignment was made; answer fully and if the agreement was in writing set it forth in full in the original.

11. What if any agreement or understanding was there as to the expenses of the litigation and as to counsel to represent said Hensey in the litigation.

12. What if any agreement was there as to what should be done with any moneys obtained by judgment against the Mercantile Trust Company by Melville D. Hensey over and above the amount of the debt due you or due the firm of Mertens and Agnew.

Answer of Melville D. Hensey.

Filed April 23, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 26989.

CHARLES H. MERILLAT, MASON N. RICHARDSON, Trustees, Complainants,

vs.

MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, PARK AGNEW, Defendants.

The answer of Melville D. Hensey to the bill of complaint in the above entitled cause filed, respectfully states:

6 (1) So far as this defendant has personal knowledge he admits the averments contained in paragraph numbered (1) of complainant's bill.

(2) This defendant admits that the complainants are citizens of the United States and residents of the District of Columbia. He admits that he is a judgment debtor of the complainants, trustees.

(3) So far as this defendant has personal knowledge he admits the averments contained in paragraph numbered (3) of the bill of complaint.

(4) This defendant admits that in suit at law No. 44822 in the Supreme Court of the District of Columbia wherein this defendant was named as plaintiff, and the Mercantile Trust Company as defendant, a judgment was entered in favor of this defendant for the sum of $8,468.00, together with costs of suit. That so far as this defendant is advised the said judgment has not been paid. And further answering, this defendant says that he has no interest in the result of said judgment, he having assigned his claim against the Mercantile Trust Company on the 21st day of October, 1903, to the defendants, Frederick A. Mertens and Park Agnew.

(5) Answering the fifth paragraph of complainants' bill this defendant says that he denies that he is the owner of the judgment against the Mercantile Trust Company in action at law No. 44822, but that the said judgment and the proceeds thereof are to be applied in accordance with a paper of assignment and an agreement bearing date of October 21, 1903, and hereinafter more particularly referred to. This defendant denies that he transferred or assigned his claim against the Mecantile Trust Company to hinder, delay or defraud his creditors, but, on the contrary, avers the fact to be that the said assignment was in good faith and for the following valuable consideration—that is to say, an indebtedness due from this defendant to the defendants, Mertens and Agnew, in the sum of $7,300, and an additional loan by said defendants to this defendant of $250.00. This defendant denies all of the other averments contained in paragraph numbered (5) of complainants' bill. And further answering, this defendant says that long prior to the 21st of October, 1903, he was indebted to the defendants, Mertens & Agnew, in the sum of $7,300 for brick furnished by the said defendants to this defendant. That this defendant being without means and unable to prosecute his claim for damages against the Mercantile Trust Company, agreed to and did assign the said claim to the said defendants, Mertens & Agnew, upon agreement that from the proceeds of any judgment that might be recovered against that company, attorneys' fees should first be paid, thereafter the claim of Mertens & Agnew against Hensey, and if there should be any balance then remaining, the same to be paid to this defendant. And this defendant further says the amount of the claim of the said Mertens & Agnew on the 21st day of October, 1903, was $7,300, which was augmented by an advancement of $250.00 as hereinbefore set out. That interest on said amount at 6 per cent. for three and a half years would bring the claim of the said Mertens & Agnew against this defendant, exclusive of attorneys' fees, to something above $9,000. And this defendant is advised that the attorneys' fees amount to $3,000; wherefore, it will appear to the Court that so far as this defendant is concerned, he is entitled to receive

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nothing from the proceeds of the judgment against the said Mercantile Trust Company.

And this defendant for answer to the interrogatories appended to said bill of complaint, says:

First. I became indebted to Mertens & Agnew as near as I can now recall, some time in 1899; that the account between us was stated as I now recall in the year 1901, and at that time I was indebted to Mertens & Agnew in the sum of $7,300,—and that I made the assignment of my claim against the Mercantile Trust Company to them to cover that indebtedness, and the additional sum of $250. which they advanced to me;—The latter advancement being sometime during the year of 1903, as I now recall.

Second. My answer to the preceding question covers question No. (2).

Third. My indebtedness to the defendants, Mertens & Agnew, was for the sale of brick by that concern to one Edward C. Kellogg, for which account I had become responsible as guarantor.

Fourth. The debt was contracted with Mertens & Agnew, brick manufacturers.

Fifth. The only agreement that I had with the defendants, Mertens & Agnew, was embraced in a written paper, bearing date October 21, 1903, a copy of which I file herewith.

Sixth. No.

Seventh. Yes; copy has been referred to and appended in the answer to interrogatory number 5.

Eighth. In my dealings with the defendants, Mertens & Agnew, they were represented by Mr. Henry F. Woodard, who prepared the paper of assignment from myself to them of my claim against the Mercantile Trust Company, and also the paper to which I have referred in answer to the fifth interrogatory.

Ninth. The defendants, Mertens & Agnew, were to pay all attorneys' fees, and be reimbursed as was provided in the contract of the 21st of October, 1903.

Tenth. There was no written agreement so far as I know between the defendants, Mertens & Agnew, and Birney & Woodard,—certainly none between the latter firm and myself as to what compensation they would receive.

MELVILLE D. HENSEY.

BIRNEY & WOODARD,
Sol's for Def't Hensey.

I do solemnly swear that I have read the foregoing answers by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

MELVILLE D. HENSEY.

8 Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 22nd day of April, 1907.

[SEAL.] M. LEROY GOUGH,
Notary Public, D. C.

(Copy.)

This agreement, entered into this twenty-first day of October, 1903, between Frederick Mertens and Park Agnew, parties of the first part, and Melville D. Hensey, party of the second part.

Whereas, the party of the second part has this day executed an assignment of his cause of action against the Mercantile Trust Company, At Law No. 44,822, in the Supreme Court of the District of Columbia:

Now, therefore, it is agreed and understood between the parties that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit, or any other suit involving the same issue, that there shall first be paid costs and attorneys' fees, secondly the claim of Mertens & Agnew against Melville D. Hensey, any *any* balance then remaining over to the said Hensey.

Witness the signatures and seals of the parties, this twenty-first day of October, 1903.

FREDERICK MERTENS.
PARK AGNEW.
MELVILLE D. HENSEY.

(Copy.)

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
MERCANTILE TRUST CO., Defendant.

WASHINGTON, D. C., *October* 21, 1903.

For value received, I hereby sell, assign, transfer and set over to Frederick Mertens and Park Agnew my cause of action in the above entitled suit, and all the proceeds which may be derived from the prosecution thereof and from any judgment that may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact.

In witness whereof, I have hereunto set my hand, this twenty-first day of October, 1903.

(Signed) MELVILLE D. HENSEY.

9 *Joint and Several Answer of Frederick Mertens and Park Agnew.*

Filed April 23, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 26989.

CHARLES H. MERILLAT, MASON N. RICHARDSON, Trustees, Complainants,

vs.

MELVILLE D. HENSEY, MERCANTILE TRUST CO., FREDERICK MERTENS, PARK AGNEW, Defendants.

The Joint and Several Answer of Frederick Mertens and Park Agnew to the Bill of Complaint Herein Filed.

First. These defendants admit that the complainants are citizens of the United States and residents of the District of Columbia, but have no personal knowledge of the other matters and things set out in paragraph numbered (1) of the bill of complaint.

Second. Answering paragraph numbered (2) these defendants admit that they are citizens of the United States and residents of the District of Columbia; that the Mercantile Trust Company is a corporation, but defendants are not advised under the laws of what state it was created. These defendants have no knowledge of the other averments contained in said paragraph (2) except that they admit that the said defendant, Melville D. Hensey, assigned to them his claim against the defendant, the Mercantile Trust Company.

Third. These defendants have no personal knowledge of the matters charged in the third paragraph of the bill and are therefore unable to make answer thereto.

Fourth. These defendants admit that sometime during the month of June, 1905, judgment was entered in favor of the defendant, Melville D. Hensey, in law cause No. 44,822, for the sum of $8,468.00, together with costs of suit. They further admit that up to the present time no part of said judgment has been paid by the defendant, the Mercantile Trust Company. And further answering the fourth paragraph these defendants say that during the month of October, 1903, the defendant, Melville D. Hensey, being then and at that time indebted unto these defendants in the full sum of $7,300, the said Hensey, in consideration of said indebtedness, and upon the further consideration of an advance to him by these defendants of the sum of $250.00, did, on the 21st day of October, 1903, assign, transfer and set over to these defendants his cause of action in suit at law No. 44,822, and all the proceeds which might be derived from the prosecution thereof, and any judgment which

might be obtained. That concurrently with said paper of
10 assignment an agreement was entered into between these defendants and the said Melville D. Hensey, which in substance provided—that from the proceeds of any judgment that might be recovered against The Mercantile Trust Company in said suit at law, or in any other suit involving the same issue, that there should first be paid costs and attorney's fees,—secondly, the claim of Mertens & Agnew against the said Melville D. Hensey,—and any balance then remaining over to the said Hensey. That pursuant to the said assignment from the said Melville D. Hensey to these defendants, they, the said defendants, laid out and expended large sums of money in the prosecution of said suit at law against the said Mercantile Trust Company, and from and before the month of October, 1903, down to the present time have litigated the claim of the said Hensey against the Mercantile Trust Company which resulted in an affirmance by the Supreme Court of the United States on the 8th day of April, 1907. That these defendants are advised by their attorneys who prosecuted the said suit that their fees or charges in connection therewith are $3,000. That after the payment of the charges of their said attorneys, the balance of the fund due by the Mercantile Trust Company and of the judgment aforesaid will be insufficient and inadequate to pay your defendants the amount of money due them from the said Melville D. Hensey in accordance with the agreement of the 21st of October, 1903.

Fifth. Answering the fifth paragraph of the complainants' bill these defendants say that they have no knowledge of any indebtedness that may have existed as between complainants and the defendant, Melville D. Hensey. They are informed that the said Hensey is insolvent but are without personal knowledge as to the truth thereof. These defendants deny that the said Melville D. Hensey assigned all his right, title and interest in his claim against the Mercantile Trust Company to these defendants for the purpose of hindering, delaying, or defrauding the complainants, or any one else. They also deny that the amount of the indebtedness due by the said Hensey to these defendants was below the amount of the said judgment, but on the contrary, aver the fact to be that the amount of defendants' claim, plus interest and attorneys' fees, is largely in excess of the amount of said judgment. These defendants deny that any secret agreement was ever entered into between them and the defendant, Hensey.

And having fully answered, these defendants pray that they may be hence dismissed with their reasonable costs in this behalf sustained.

FREDERICK MERTENS. [SEAL.]
PARK AGNEW, [SEAL.]
Business Resident.

BIRNEY & WOODARD.
Sol's for Def'ts, Mertens & Agnew.

We do solemnly swear that we have read the foregoing answer by us subscribed and know the contents thereof, and that
11 the facts therein stated upon our personal knowledge are true, and those stated upon information and belief we believe to be true.

FREDERICK MERTENS. [SEAL.]
PARK AGNEW, [SEAL.]
Business Resident.

Subscribed and sworn to before me this 15th day of April, 1907.
[SEAL.] OSCAR H. ROBEY,
Notary Public, D. C.

Replication to Answers of Hensey, Mertens, and Agnew.

Filed April 26, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

Equity. No. 26989.

CHARLES H. MERILLAT et al.
vs.
MELVILLE D. HENSEY et al.

And now come the complainants and join issue with the answers of the defendants Melville D. Hensey, Frederick Mertens and Park Agnew.

MASON N. RICHARDSON,
Complainants' Solicitor.

Answer of Mercantile Trust Co.

Filed May 27, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 26989.

CHARLES H. MERILLAT et al., Trustees,
vs.
MELVILLE D. HENSEY et al.

The defendant, the Mercantile Trust Company, for answer to so much and such parts of the bill of complaint in the above-entitled cause exhibited against it and others as it is advised it is material or necessary for it to answer, answering says:

1. It is willing to admit for the purposes of this suit the allegation contained in paragraph 1.

2. It is willing to admit for the purposes of this suit all the allegations contained in paragraph 2, excepting the allegation
12 that it is a corporation doing business in the District of Columbia, which allegation it denies. Further answering said paragraph, it says that it is a corporation organized under the laws of Pennsylvania, and has its office and principal place of business in the City of Pittsburg, in the State of Pennsylvania; that it has no agent in the District of Columbia, and does not do business in said District.

3. It has no knowledge of any of the facts set out in paragraph 3 of said bill, and, therefore, can neither admit nor deny the same.

4. It admits the allegation contained in paragraph 4 of said bill.

5. It has no knowledge of the facts set out in paragraph 5 of said bill, and, therefore, can neither admit nor deny the same.

And having fully answered the said bill of complaint, it prays that it may be hence dismissed with its reasonable costs in this cause incurred.

MERCANTILE TRUST CO.,
By HAYDEN JOHNSON, *Att'y.*

Answer under oath waived.

MASON N. RICHARDSON, *Sol'r.*

Replication to Answer of the Mercantile Trust Company.

Filed May 27, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

Equity. No. 26989.

CHARLES H. MERILLAT et al.
vs.
MELVILLE D. HENSEY et al.

And now come the complainants, and join issue with the answer of the defendant The Mercantile Trust Company.

MASON N. RICHARDSON,
Attorney for Complainants.

Testimony on Behalf of the Complainants.

Filed October 2, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 26989.

CHARLES H. MERILLAT et al.
vs.
MELVILLE D. HENSEY et al.

Pursuant to request of counsel, I hereby give notice that the complainants in the above entitled cause will proceed to
13 take testimony in support of the allegations contained in their bill of complaint before me on Wednesday, May 15th, 1907, at three (3) o'clock P. M., in the law offices of Mason N. Richardson, Esq., Fendall Building.

You are invited to be present and take such action as you may be advised.

EDWIN L. WILSON, *Examiner.*

To Messrs. Birney & Woodard, Attorneys for certain Defendants.

Copy of above notice mailed to attorneys for defendants this 10th day of May, 1907.

EDWIN L. WILSON, *Examiner.*

WASHINGTON, D. C., *May 15th*, 1907,
WEDNESDAY, at 3 o'clock p. m.

Met pursuant to notice hereto attached at the law offices of Mason N. Richardson, Esq., Fendall Building, for the purpose of taking testimony for and on behalf of the complainants.

Present: M. N. Richardson, Esq., for the complainants, and Examiner.

At the request of counsel for the defendants this session was adjourned to meet at the same place on Saturday morning at 10 o'clock A. M., May 18th, 1907.

——— ———, *Examiner.*

WASHINGTON, D. C., *May 18th*, 1907,
SATURDAY, at 10 o'clock a. m.

Met pursuant to adjournment as next hereinbefore noted at the same place for the purpose of taking testimony for and on behalf of the complainants.

Present: Messrs. Chas. H. Merillat and M. N. Richardson for the complainants; Mr. Henry W. Woodard for the defendants; Examiner and witnesses.

PARK AGNEW, one of the defendants, produced as a witness for the complainants, and being duly sworn, testified as follows:

By Mr. MERILLAT:

Q. Mr. Agnew, please state your full name and your residence?
A. Park Agnew; fifty-nine years old last July; Alexandria, Va., is my residence.
Q. And occupation.
A. Coal merchant and brick business.
Q. Are you a member of the firm of Mertens and Agnew?
A. Yes, sir.
Q. And were you a member of that firm at the time a certain assignment was taken from Melville Hensey?
A. Yes, sir.

Q. You were summoned, I believe, Mr. Agnew, to pro-
14 duce the books showing accounts and dealings——

A. I could not produce the books. I never had an account of Mertens and Agnew in my life—I never kept an account, and never had anything to do with the details of the business management.
Q. You are a member of that firm?
A. I am a member of that firm.
Q. That firm has account books?
A. Mr. Mertens is the only one that can tell you anything about the books or how they are kept or where they are kept. I could not tell you where they are kept. You might as well ask me to produce the north pole.
Q. As a member of that firm you have the usual rights that a copartner has and the usual custody or control of their books, do you not?
A. That is something I never exercised. I never have had from its institution anything whatever to do with the accounts or its financial matters. Mr. Mertens has absolutely attended to that. I have been, I suppose, what would be termed, so far as any active interest in the business is concerned, a silent partner as a matter of fact. I know nothing whatever of the matters, no more than you, except from time to time I might see something in connection with the matter or as a result of some conversation with Mr. Mertens.

Mr. MERILLAT: We will have to suspend further examination until those books are produced. There is a *subpœna duces tecum* out on Mr. Mertens as well as Mr. Agnew for the production of the books.
Mr. WOODARD: He *was* present and you can examine him as to the time this agreement you have spoken of was executed. You might wish to ask him something about that.
Mr. MERILLAT: I do not care to until I see the books. I would sooner have one complete examination.
Mr. WOODARD: What you want to do is to suspend the examination at this point?
Mr. MERILLAT: To suspend at this point until we can see the books and papers that are called for by the *subpœna duces tecum*

and if there be any correspondence between the firm of Mertens and Agnew and Melville D. Hensey we would like to have it.

Mr. WOODARD: I don't think there was. You better fix a time for adjournment.

Mr. MERILLAT: We will fix whatever date suits the gentlemen.

Mr. WOODARD: I would like to go ahead. I am not disposed to delay you.

PARK AGNEW.

Signed for the witness by me by consent and agreement of counsel, this 2nd day of October, 1907.

EDWIN L. WILSON, *Examiner.*

At this moment Mr. Frederick Mertens, one of the defendants, came into the room.

Mr. MERILLAT: Please swear Mr. Mertens.

15 FREDERICK MERTENS, one of the defendants, being duly sworn on behalf of the complainants, testified as follows:

By Mr. MERILLAT:

Q. Please state your full name, your age, residence and occupation, Mr. Mertens.

A. F. Mertens; Cumberland, Maryland; Lumber business.

Q. Are you a member of the firm of Mertens and Agnew?

A. Yes, sir.

Q. And, if so, were you a member of that firm at the time it had certain dealings with Melville Hensey?

A. Yes, sir.

Q. And took an assignment from Melville Hensey?

A. Yes, sir.

Q. You have been summoned to produce the checks and check stub books and books of account of the firm of Mertens and Agnew or of yourself with Melville Hensey in relation to his claim.

A. I have not been subpœnaed at all.

Mr. WOODARD: We will help you so far as we can do so.

Mr. MERILLAT: The subpœnae is out and if it has not actually reached him it cannot be helped, but, for the purpose of settling this matter as far as possible, I think we better go on with the examination.

By Mr. MERILLAT:

Q. Mr. Mertens, have you certain evidences of indebtedness of Melville Hensey to the firm of Mertens and Agnew for which you hold an assignment, and, if so, produce them?

A. We have against Melville Hensey notes to this account.

Q. Are these papers that I hand you the notes that Melville Hensey made out to Mertens and Agnew? Are these the notes referred to?

A. They are some of the notes.

Mr. MERILLAT: We desire to offer in evidence these notes and that they be copied into the record.

Said notes are in words and figures following, to wit:

$500.00. WASHINGTON, D. C., *Dec. 17th,* 1906.

Three months after date I promise to pay to the order of Mertens & Agnew Five hundred Dollars, at 3rd Nat. B'k, Cumberland, Md., for value received, with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Endorsement: Mertens & Agnew. F. Mertens.
Stamp- on back: Renewed, March 18/1907, at 3 Mos., for $500.

$250. WASHINGTON, D. C., *Dec. 20th,* 1906.

Three months after date I promise to pay to the order of Mertens & Agnew Two hundred and fifty Dollars, at 3rd Nat. B'k
16 Cumberland, Md., for value received, with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Endorsement: Mertens & Agnew. F. Mertens.
Stamped on back: Renewed, March 20/1907, at 3 mos., for $250.00.

$400.00. WASHINGTON, D. C., *Dec. 31st,* 1906.

Three months after date I promise to pay to the order of Mertens & Agnew Four hundred Dollars, at 3rd Nat. B'k Cumberland, Md., for value received with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Endorsement: Mertens & Agnew. F. Mertens.
Stamped on back: Renewed, Mar. 30/1907, at 3 mos., for $400.00.

$700. WASHINGTON, D. C., *Jan. 10th,* 1907

Three (3) months after date I promise to pay to the order of Mertens & Agnew Seven hundred Dollars, at 3rd Nat. B'k of Cumberland, Md., for value received, with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Stamped on back: Renewed, April 10/'07, at 3 mos., for $700.00.

$500.00. JAN'Y 12, 1907.

Three months after date I promise to pay to the order of Mertens & Agnew Five hundred Dollars, at 3rd Nat. B'k, Cumberland, Md., for value received with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

In left hand corner on face: J. P. Agnew & Co. hold this note of $500.00.

$600.00. WASHINGTON, D. C., *Jan. 18th,* 1907.

Three (3) months after date I promise to pay to the order of Mertens & Agnew Six hundred Dollars, at 3rd Nat. B'k Cumberland, Md., for value received, with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Stamped on back: Renewed, April 18/1907, at 3 mos. for $600.00.

17 $400. WASHINGTON, D. C., *Nov.* 22/06.

Three (3) months after date I promise to pay to the order of Mertens & Agnew Four hundred Dollars, at 3rd Nat. B'k Cumberland, Md., for value received, with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Renewed, Feb'y 22/1907, at 3 mos. for $400. (The foregoing is stamped on the back of said note.)

$418. WASHINGTON, D. C., *Dec.* 4/06.

Three months after date I promise to pay to the order of Mertens & Agnew Four hundred and eighteen 00/100 Dollars, at Third Nat. B'k Cumberland, Md., for value received with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Endorsed: Mertens & Agnew. F. Mertens. (Lines drawn through the endorsements.)

Stamped on back: Renewed March 4/1907 at 3 mos. for $418.00.

$1750. WASHINGTON, D. C., *Feb'y 7th,* 1907.

Three (3) months after date I promise to pay to the order of Mertens & Agnew Seventeen hundred and fifty Dollars, at 3rd Nat. B'k Cumberland, Md., for value received, with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Stamped on back: Renewed, May 7/1907 at 3 mos. for $1750.00.

$140. WASHINGTON, D. C., *Dec. 22nd*, 1906.

Three (3) months after date I promise to pay to the order of Mertens & Agnew One hundred and forty Dollars, at Third Nat. B'k Cumberland, Md. for value received, with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Endorsed: Mertens & Agnew. F. Mertens.
Stamped on back: Renewed, March 22nd, 1907, at 3 mos. for $140.

$1700. WASHINGTON, D. C., *Jan. 18th*, 1907.

Three (3) months after date I promise to pay to the order of Mertens & Agnew Seventeen hundred Dollars, at 3rd Nat. B'k
18 Cumberland, Md., for value received, with interest at the rate of 6 per cent. per annum until paid.

M. D. HENSEY,
1302 *F St., N. W.*

Endorsed: Mertens & Agnew. F. Mertens.
Stamped on back: Renewed. April 18/1907, at 3 mos. For $1,700.

By Mr. MERILLAT:

Q. Now, I will ask you if those notes which have just been offered in evidence were given to you by Melville D. Hensey, and, if so, where it was that they were given to you and when?

Mr. WOODARD: I object to that because the notes speak for themselves.

Q. (continued). Were these notes given to you on the day on which they purport to be dated, namely, from December 17th, 1906, to February 7th, 1007. I have given you the first and last dates.

A. The notes here were given to us by Mr. Melville Hensey.

Q. My question is, were they given to you on or about the dates that they purport to bear?

A. They were given this date. (Indicating on the note.) But these notes, understand, are renewals, and the first notes were given in 1899.

Q. With whom did you have an account because of which these notes were given?

A. I cannot recollect that man's name. He ran off.

Mr. WOODARD: Kellogg.

A. Mr. Kellogg.

Q. In whose name was that account kept?

A. It was kept in Kellogg and Hensey.

Q. So, then, as I understand, this account that you have for which these notes you state were given in payment was kept by

Mertens & Agnew in the name of Kellogg and Hensey? Is that correct?

A. They were to pay cash for it when they started off buying. When they could not pay cash Mr. Hensey came to us and asked if we could use a note, and that is the way these notes came to be given.

Q. You say when they started buying. When who started buying?

A. Mr. Hensey.

Q. Have you an account on your books of those transactions?

A. No, sir; there is no account kept of it at all. It was run off with brick yard slips and at the end of every week or two weeks or three weeks they settled it and the slips were given to Mr. Hensey?

Q. So, as I understand, then, you have no evidence whatsoever of this indebtedness other than these notes?

A. Don't the notes there speak for themselves.

Mr. WOODARD: Just answer.

A. I don't think they have.

19 Q. Do you mean to say that you have no other books?

A. No, sir; it was closed up and treated as a cash transaction by those notes. Mr. Hensey has all the slips of the loads that were hauled there.

Q. Does not the firm of Mertens & Agnew keep mercantile accounts showing their dealings with persons with whom they have business dealings?

A. They do if they run any accounts, but this was treated as a cash transaction.

Q. Have you the originals of the notes for which you say these were renewals?

A. I think Mr. Hensey has those.

Q. You have not, at any rate?

A. We have not; no, sir. I don't think that we have them.

Q. Do you know whether or not you have them?

A. I do not. If Mr. Hensey was going to be here he could answer that. I think they were all sent back to him.

Q. These dealings you had were with Kellogg and Hensey, were they not?

A. Yes, sir.

Q. Over what period of time did they cover?

A. I cannot tell you that. I cannot tell you that, sir.

Q. As much as a year?

A. I could not tell you that, sir. It may seem very strange, but it is true as Mr. Agnew and I run that yard out there, we were forced to keep it to save ourselves, and we know very little about it, until Saturday comes when it is time to pay off.

Q. Who ran the yards?

A. Mr. Eberly.

Q. What is his first name?

A. Frederick Eberly.

Q. Then, as I understand it, you were the true—I will ask you this——

A. We are the owners of the yard and he is our hand. That is all there is about it.

Q. Do I understand, then, that both of you were owners of the yard and that you had a manager and that you had no books kept?

A. Yes, sir.

Q. Showing the persons to whom you delivered brick, and the amount that was delivered and the price that was to be paid therefor?

A. We kept a shipping book—a daily report. If a man gets one thousand bricks or a hundred thousand bricks, there is a slip for each and every load and it is those which we settled by, and those which we turned over to Mr. Hensey and he paid us by turning over these notes.

Q. Do I understand, then, that aside from these little slips showing the deliveries that you have no books at all?

A. Oh, yes, sir; we have books, but this was treated as a cash transaction.

Q. Did you get cash?

A. We got these notes; yes, sir.

Q. When did you first get the notes, at the time of the deliveries of the bricks?

A. At the time; yes, sir.

Q. Of the delivery of each brick?

A. Oh, no, sir; we settled.

Q. Each brick?

A. I suppose we settled it every two weeks.

Q. Do you know that it was settled every two weeks?

A. I am satisfied it was.

Q. When was it you first began to take notes?

A. When they ran short of money.

Q. How soon after that was it, or how soon after your account began?

A. I cannot tell you that, sir.

20 Q. Well, after they began to run short of money, did you open any account with them then?

A. We closed the accounts with notes. We had slips for every wagon load, whether it called for six or eight hundred, and we closed it and rendered a bill and they paid us.

Q. Well, as a matter of fact, where you deliver brick, don't you then have an account kept in your bo-ks?

A. Not if it is paid cash. We treated this as a cash transatcion.

Q. When was it that he ceased paying you in cash?

A. I could not tell you that, sir.

Q. How long a time were you delivering brick to him after he ceased to pay you cash?

A. I could not tell you, sir.

Q. About how long has it been since Melville Hensey made any purchases of you?

A. Why Melville Hensey never made any purchases of us only in this transaction.

Q. About how many years ago was it?
A. That was in 1899, to the best of my recollection.
Q. Where were the brick delivered?
A. I do not know. Wherever the houses were built.
Q. Is it not a fact that you delivered brick to him on account of those buildings both on Florida Avenue and Petworth and Washington Heights?
A. I do not know anything about that.
Q. You know nothing whatsoever about that?
A. No, sir.
Q. How long after your original transaction, after he ceased paying cash to you, was it, that you got your first note from him?
A. I could not tell you that, sir.
Q How many renewals of the note, if there have been any renewals?
A. I cannot tell you that.
Q. Has anything ever been paid on account of that transaction
A. There are the notes, they speak for themselves. The account was begun in 1899.
Q. At what price did you charge?

Mr. WOODARD: Objected to.

A. I do not know. I could not tell you that plainly.
Q. At what price per thousand did you charge Melville Hensey for the brick?

Mr. WOODARD: Objected to.

A. I do not know.

Mr. RICHARDSON: Let him get the question first.

Q. What agreement did you have with him as to the price which he was to pay you? Did you have a written contract and agreement with him?
A. There was an agreement for a price; yes, sir.
Q. How many brick did you deliver to him?
A. I do not know. Mr. Hensey can tell you that.
Q. Did you deliver any brick to Melville Hensey for as much as three months after he failed to pay you cash?

21 Mr. WOODARD: This question is objected to because the witness has previously stated that he does not know.

Mr. MERILLAT: Then no harm can be done from his repeating that.

Mr. WOODARD: I cannot see any real reason for asking the same thing over two or three times.

Mr. MERILLAT: We desire to ascertain how little he does know about this matter. Go ahead and answer, Mr. Mertens.

A. What is it you want to know.

Mr. WOODARD: Read the question, Mr. Examiner.
(Hereupon the question was repeated.)

A. I do not know.
Q. Have you any knowledge at all on the subject as to when he

ceased to pay you cash and from what period, or over what period of time this matter ran for which you claim this assignment?

A. All I know is this, that Melville Hensey has given us notes for the amount of money that was due us which we have had and they are not paid.

Mr. MERILLAT: We now call on the witness, so that the record may be clear, to produce the accounts of the firm of Mertens & Agnew as brick manufacturers—the account books of the firm of Mertens & Agnew as brick manufacturers for the years 1899 and 1900.

Mr. WOODARD: Just enter on the record this, Mr. Wilson: that in view of the fact that the witness has testified that no accounts were kept of transactions with Melville Hensey, upon advice of counsel the witness will refuse to produce the books of account of the firm of Mertens and Agnew unless the court shall direct otherwise.

Mr. MERILLAT: We claim, of course, the right to see the books.

Q. What if anything, do you know as to a loan of two hundred and fifty dollars to Melville Hensey?

A. We did not lend Melville Hensey two hundred and fifty dollars.

Q. At any time?

A. We paid Melville Hensey two hundred and fifty dollars.

Q. You paid him two hundred and fifty dollars?

A. Yes, sir; we paid Melville Hensey two hundred and fifty dollars for his interest.

Q. His interest in what?

A. In this suit.

Q. When did you do that?

A. Some five or six or seven years ago, is it not, Mr. Woodard?

Q. What was that done for? Why did you pay him two hundred and fifty dollars in this suit?

A. Because Mr. Agnew and I had put up everything in this law suit, and before anything was done I took him down to Mr. Woodward's office and he assigned everything over to us for fighting this claim. I think it is a very dirty and contemptible thing in
22 making us fight this case as we have been doing. The money was due us and it should have been paid.

Q. Was any demand made by Melville Hensey on you for any price before he assigned it over?

A. Not to my knowledge.

Q. Why did you have to fight the claim?

A. Who would have done it?

Q. If Melville Hensey had the claim why could he not have done so?

Mr. WOODARD: I object to this as asking for the opinion of somebody's else state of mind.

Q. (continued). You say who would have done it? What do you mean by that remark?

A. I meant to say that he hadn't the money to fight the case.

Q. Why did you have to put the money up?

A. Who would have done it?
Q. Why could not Melville Hensey have done it?
A. Well, you know that he hasn't got anything to put up.
Q. At that time did he not have any money to put up?
A. I don't think so. I think when that was made the boy did not have anything.
Q. In other words, he was not able to stand the costs?
A. I don't suppose he could have stood the costs that we put up; no, sir.
Q. Well, do I understand that this two hundred and fifty dollars was given him for costs for prosecution of the suit?
A. No, sir.
Q. For what was it given?
A. All of his interest that he had in the case.
Q. And at that time did he have certain other people to whom he owed money?
A. I do not know. I do not know anything about his business.
Q. What property did he have of any sort?
A. I have no idea.
Q. Did you make any effort to inquire?
A. No, sir.
Q. For how long a time was this money owing to you before it was paid?
A. What money?
Q. Before this assignment?
A. I do not know. It was done before he entered the law suit though.
Q. Had the money been owing to you as much as two years?
A. The paper speaks for itself. I cannot tell you that.
Q. Did you make inquiry of Melville Hensey before you paid the two hundred and fifty dollars to him?
A. I don't know as I did. I could not answer that.
Q. Did any one ever make any inquiry into his condition?
A. I do not know.
Q. Did you make any effort to collect the money from him before you took over his interest in this matter?
A. Why we had his notes there. They were being renewed. He could not pay them.
Q. He could not pay the notes?
A. He did not pay them. You have got them there.
Q. Did you make any efforts to collect your notes?
A. What notes?
23 Q. The notes he originally gave you for this account.
A. The boy didn't have the money.
Q. How do you know he did not have the money?
A. He renewed it. He renewed the paper there.
Q. Did you have any interviews with him?
A. He said he could not pay them. He would have to renew them. He did not have any money.
Q. Did he tell you he did not have any money?
A. The notes show there, being renewed.

Q. I asked you if he said he did not have any money?
A. I could not swear one way or the other on that point.
Q. Did you not have some interviews with him in regard to his paying you or how he would pay you?
A. I told him I wanted that paper made up.
Q. What did he say?
A. He renewed it.
Q. How much was the amount of the first note you got from him?
A. I could not tell you that, sir. I could not tell you that, sir. The statement will show.
Q. As he could not pay you even what he owed you, why did you take this claim and why did you pay him still further money?
A. Why we thought that we would have the bonding company. We thought the bondsman on that property was surely responsible for the material that we had put in the houses, and we bought his right and interest in the property that he had so that we would be sole owners of whatever he might possess.
Q. And then, as I understand it, you had the entire right and interest that he had in this claim against the Mercantile Trust Company?

Mr. WOODARD: I object to that because the contract is in writing and the contract speaks for itself, and anything that this witness might say could not change the legal effect of the written papers.
(Hereupon the question was read.)

Mr. MERILLAT: Is that correct?
A. The paper there speaks for itself.
Q. What, if anything, was to be done, as you understood, with any money over and above the amount of your claim with interest and costs?

Mr. WOODARD: Objected to because the contract is in writing and it is now produced for the information of counsel, and a copy of it has been heretofore appended to the answer of Mr. Mertens. The contract speaks for itself.

Q. You say this transaction started as a cash transaction. Is that correct?
A. They paid us; yes, sir; they paid us there including those notes.
Q. What did you do after the first occurrence when you did not get cash for what you were selling?
A. He gave us a note.
Q. For how long a time was that note to run, and how much was the note?
A. I do not know. The notes are there. The notes there are just as long from the first to the end.
24 Q. I see a note for five hundred dollars, was that the amount of the first note made and you got?
A. That was one amount he owed us.
Q. When that note fell due and it was not paid, what did you do?
A. I renewed it.

Q. Did you call upon him to pay it?
A. Sure.
Q. What did he say?
A. He did not have the money.
Q. Did you ask him whether he had any property of any sort?
A. I don't think I ever mentioned anything of that kind to him.
Q. Did you make any inquiry whether he had any property or could give any security for your debt?
A. I do not know as I did. I could not answer that question.
Q. What did you do, Mr. Mertens, after the note was not paid; you put the matter in the hands of your attorney?
A. We could not do anything else.
Q. Why could you not do anything else?
A. What would we get?
Q. What do you mean by saying, "what would you get?
A. What did Hensey have? I had the note, but as you state, what was there for us to get. It would not have done any good.
Q. How do you know whether you would have gotten anything if you did not make any inquiry as to whether he had any security?

Mr. WOODARD: This question is objected to as calling for an impossible condition and not for a fact; the question being in effect, what would have been the result if something had been done which in fact did not take place.
Mr. MERILLAT: The witness has been asked the question, what effort, if any, was made to ascertain whether or not Melville Hensey had any property or any security.
Mr. WOODARD: And that is objected to.
Mr. MERILLAT: And he says he does not know and he made no effort and cannot answer as to that, and then follows it up with the statement that it would not have done any good. Now, my question is how he is able to say that it would not have done any good unless he made or caused to be made some inquiry to ascertain.
Mr. WOODARD: The question is objected to as irrelevant and immaterial as to any possible issue in this case.

Mr. MERILLAT: Now, Mr. Mertens, if you will answer.
A. I really do not know. I could not answer the question.
Q. Did you inquire into his affairs at all when these notes kept coming back unpaid?

Mr. WOODARD: Objected to as being immaterial and irrelevant.

A. I do not know.
Q. Did you make any draft on him?

Mr. WOODARD: Objected to as being immaterial and irrelevant.

A. You have got the drafts in your hands there that we made on him.
Q. I have the notes here.
A. We have no drafts.
25 Q. Did you make demand for payment on him?

Mr. WOODARD: Objected to because the witness has answered that question at least three times.

Q. Now, what interest was paid by him on the notes? First, was the interest paid by him on the notes?

A. No, sir; you know it was not. What is the use of asking that question.

Q. Was any interest ever paid?

A. No, sir.

Q. During this time that Melville Hensey was owing you money, did he have other persons to whom he owed money?

A. Indeed I do not know.

Q. Is it not a fact that you did join with other creditors as to a claim you had against Melville Hensey?

Mr. WOODARD: Objected to as immaterial and irrelevant.

Mr. MERILLAT: Now, please answer the question.

A. No, sir.

Q. Why, is it not a fact that you made Bates Warren a trustee for yourself and for other creditors?

Mr. WOODARD: Objected to as immaterial and irrelevant.

A. Not as I know of.

Q. Did you not know that Bates Warren was made a trustee by yourself to pay over to creditors who had furnished material to Melville Hensey or who had claims against him for material furnished, which was not paid for?

Mr. WOODARD: Objected to as immaterial and irrelevant.

A. I do not know.

Q. Did you ever look to Bates Warren as a trustee for payment to you of any money that you had coming to you on account of your claim against Melville Hensey?

Mr. WOODARD: Objected to as immaterial and irrelevant.

A. I never had any dealings with Bates Warren in my life.

Q. Did the firm of Mertens and Agnew?

A. I don't think so. I believe Mr. Agnew has got some dealing with him now in the last month or two, but not in this case of Hensey.

Q. Did Mertens and Agnew unite with Melville Hensey in filing a bill against the Mercantile Trust Company?

Mr. WOODARD: Objected to for the reason that if such suit were filed the suit speaks for itself.

A. You will have to ask our attorney.

Q. When was it you first put this matter in the hands of your attorneys, and who was that attorney?

A. Birney and Woodard, but I cannot give the date.

Q. Was it prior to the time of the assignment that Melville Hensey made to you of his interest in this suit?

A. Before, of course.

Q. How long a time prior to that?

A. I do not know.
Q. A year?
A. When we start in this kind of business we always go right down and get the advice of the attorneys first, and when we get
26 that advice then we start in. It must have been before.
Q. I will ask you this, for how long a time had Birney and Woodard been your attorneys?
A. I expect it has been ten or twelve years. Mr. Woodard, is not that right?
Mr. WOODARD: I expect so.
Q. And for what buildings were these brick furnished?

Mr. WOODARD: Objected to because it is immaterial and irrelevant.

A. I cannot tell you.
Q. Do you know anything about the building of some houses on Washington Heights in the name of Kellogg and Hensey?

Mr. WOODARD: Objected to because it is immaterial and irrelevant.

A. No, sir; I do not.
Q. Was this account in the hands of Birney and Woodard as much as a year prior to the time of this assignment?
A. I could not tell you that.
Q. State to the best of your knowledge and recollection and belief how long a time it had been in their hands?

Mr. WOODARD: Objected to as any communication between Mr. Mertens and his attorney would have been confidential, and because it is immaterial and irrelevant to any issue that might arise in this case.

A. I do not know.
Q. This account, except for this two hundred and fifty dollars, is all for brick furnished, is it not?
A. Yes, sir.
Q. At what price per thousand is the account made up?

Mr. WOODARD: Objected to because the witness has already answered the same question.

A. I do not know.
Q. Please repeat, as nearly as you can, the conversation you had with Melville Hensey at the time that you advanced this two hundred and fifty dollars?
A. I really could not tell you. It has been so long that I did not keep any minute of it and I do not know.
Q. Did Melville Hensey make any request of you, or any demand, for any money at the time this two hundred and fifty dollars was paid?
A. I do not know.
Q. Did you not know at that time that Melville Hensey was broke?
A. No, sir; I cannot say that I could swear to that.

Q. You have just stated that there was no use of pressing the suit.
A. A man being broke means——
Mr. WOODARD: Just answer the question, Mr. Mertens.
A. No, sir.
Q. Did he state to you that he had no money wherewith to prosecute the suit?

Mr. WOODARD: Objected to as being immaterial and irrelevant.

A. I do not know.
27 Q. Did you call on Melville Hensey and request him to institute the suit?

Mr. WOODARD: Objected to as being immaterial and irrelevant and inconsistent with the record facts of the case.

Mr. MERILLAT: Now answer please.
A. It has been so long I cannot recall those things.
Q. Then, as I understand, you have no books of this transaction?
A. No, sir.
Q. And you cannot recall how it was you came to advance the two hundred and fifty dollars and what conversation you had with Melville Hensey at the time. Is that correct?

Mr. WOODARD: I object to the question as being a conclusion of counsel, and if he will refer to Mr. Mertens' testimony it will speak for itself.

A. It has been so long that I do not know.
Q. Well, I will ask you this question: Was this two hundred and fifty dollars voluntcered by you or did Mr. Hensey suggest that you should give him something at this time?
A. I cannot say.
Q. Was Mr. Agnew present at this time or at any of your interviews with Melville Hensey?
A. I do not think so.
Q. When did you first learn that Melville Hensey was being sued on account of what is known as the Le Droit Park syndicate?

Mr. WOODARD: Objected to as being immaterial and irrelevant to the issues in this case.

A. I do not know.
Q. *What* it prior to the time of this assignment?
A. I do not know.
Q. Have you any recollection at all on the subject?
A. I really have not.
Q. Did you know he was sued or being sued for some large amount?
A. I really cannot say that I knew anything about it.

Mr. WOODARD: What suit was this?
Mr. MERILLAT: The Le Droit Park Syndicate suit.
Mr. WOODARD: The one that you gentlemen brought?
Mr. MERILLAT: Yes, sir.

A. You know I live in Cumberland and I am only here one day

in the week. I do not count Washington my home. A lots of things happen here that I do not know anything about.

Q. At whose instance was there put in the assignment the clause stating that any amount over the amount due you and the costs that might be realized from this suit against the Mercantile Trust Company was to be paid to Melville Hensey?

A. I do not know anything about that.

Q. What do you mean by that?

A. I cannot say. I did not know that there was a clause in there of that kind.

Q. Is that your signature, Mr. Mertens? (Hands witness a paper.)

A. That is my signature.

Mr. MERILLAT: We desire to offer the original in evidence and ask that the same be copied in the record.

28 The original is marked complainant's exhibit F. M. No. A and is in words and figures following, to-wit:

This agreement entered into this twenty-first day of October, 1903, between Frederick Mertens and Park Agnew, parties of the first part, and Melville D. Hensey, party of the second part:

Whereas the party of the second part has this day executed an assignment of his cause of action against the Mercantile Trust Company, at Law No. 44,822, in the Supreme Court of the District of Columbia:

Now, therefore, it is agreed and understood between the parties that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit, or any other suit involving the same issues, that there shall first be paid costs and attorneys' fees, secondly the claim of Mertens and Agnew against Melville D. Hensey, and any balance then remaining over to the said Hensey.

Witness the signature and seals of the parties, this twenty-first day of October, 1903.

FREDERICK MERTENS.
PARK AGNEW.
MELVILLE D. HENSEY.

By Mr. MERILLAT:

Q. Were you present when Melville Hensey signed his name to that paper?

A. I expect I was.

Q. Were both of these papers signed at one and the same time?

(Counsel refers to paper just read and the one just following the next answer.)

A. I do not know. I suppose they were.

Mr. MERILLAT: We desire to offer in evidence the original assignment.

Said paper is marked complainants' exhibit No. B and is in words and figures following, to wit:

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
MERCANTILE TRUST COMPANY, Defendant.

WASHINGTON, D. C., *October* 21, 1903.

For value received, I hereby sell, assign, transfer and set over to Frederick Mertens and Park Agnew my cause of action in the above entitled suit, and all the proceeds which may be derived from the prosecution thereof and from any judgment that may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact.

29 In witness whereof, I have hereunto set my hand, this twenty-first day of October, 1903.

MELVILLE D. HENSEY.

By Mr. MERILLAT:

Q. That is Melville Hensey's signature to the paper just offered in evidence?

A. Yes, sir; those notes there show that, I guess.

Mr. MERILLAT: We have offered in evidence the notes. If we have not done so, we also desire to offer in evidence the notes. The Examiner can mark them and incorporate one note in the record. I guess all of the notes better be copied into the record.

Mr. WOODARD: We will produce the originals at the hearing of the cause, if necessary.

(Said notes have been heretofore copied in the record beginning at page 6 and ending on page 11.)

Cross-examination.

By Mr. WOODARD:

Q. Mr. Mertens, you have produced here some promissory notes. Are you familiar with the signature of Melville D. Hensey?

A. Yes, sir.

Q. On these various notes which you have produced does the signature of Mr. Melville Hensey appear?

A. Yes, sir.

Q. Now, tell me, if you please, with reference to the history of these notes? What was their emanation?

A. Well, they started off for bricks that were bought prior to November 3rd, 1899, prior to that time.

Q. Now, as I understand you, the bricks which were delivered were to be paid for in cash?

A. Yes, sir.

Q. And that when they were not paid for in cash then you commenced to accept notes in payment? Is that correct?

A. Yes, sir; that is correct.

Q. These notes, which I will presently read in evidence, are the sequels, so to speak, of the notes which were originally given you for brick furnished and delivered to Mr. Hensey or to Mr. Kellogg?

A. Yes, sir.

Q. Is that so?

A. Yes, sir.

Q. Where were these notes put after they were taken, the original notes? What was done with them, if you kept them?

A. Well, Mr. Woodard, and the attorneys on the opposite side, I had in Cumberland ten notes amounting to $6,858. Mr. Agnew has one note of five hundred dollars. Is that right, Mr. Agnew.

Mr. AGNEW: Yes, sir.

Q. What was done with those notes?

A. Those notes were discounted.

Q. Whereabouts?

A. In Cumberland.

Q. And every time the notes, or any of them, matured what was the custom or practice between Mertens and Agnew and Melville D. Hensey?

A. He would send us new notes.

30 Q. What would you do with the old ones?

A. I cannot answer that, Mr. Woodard, whether they were returned back to Mr. Hensey or not.

Q. Now, I see that one of these notes bears date December 17th, 1906, that being for five hundred dollars; one for two hundred and fifty dollars dated December 20th, 1906; one for four hundred dollars which bears date December 31st, 1906; one for seven hundred dollars bearing date January 10th, 1907; one for six hundred dollars bearing date January 8th, 1907; one for seventeen hundred and fifty dollars bearing date February 7th, 1907; one for four hundred dollars bearing date November 22nd, 1906; one for four hundred and eighteen dollars bearing date December 4th, 1906; one for one hundred and forty dollars bearing date December 22nd, 1906, and one for seventeen hundred dollars bearing date January 18th, 1907. Now, with reference to all of these notes, what understanding, if any, was there between you and Mr. Hensey as to his giving you these notes or renewing these notes after he had assigned to you his security or his account against the Mercantile Trust Company?

Mr. MERILLAT: Objected to on the ground that the notes and assignment speak for themselves.

Mr. WOODARD: Do you understand the question, Mr. Mertens?

A. I think I do. Why, we were to get all that the bonding company owed him—was to be for our use.

Q. I don't think you understood me. Is it not a fact that after the 21st of October, 1903, that being the date when the assignment was made to you of the Mercantile Trust Company account, is it not a fact that after that date that these notes were renewed from time to time as a matter of convenience to you?

Mr. MERILLAT: Objected to. That question is objected to on the ground that the best evidence is the notes themselves and that the present evidence is incompetent, and we give notice that we will make a motion to strike out any answer that the witness makes until the notes themselves are produced.

Mr. WOODARD: Read the question and let the witness answer the same.

(Hereupon the question was read.)

A. Yes, sir.

Q. And is it not a fact, Mr. Mertens, that at the present time that at least one of the notes, to wit, the note bearing date January 12th, 1907, is now discounted at Alexandria, Virginia?

Mr. MERILLAT: Objected to as incompetent and immaterial and move to strike out any answer.

A. Do you want me to answer.

Q. Yes, sir.

A. Yes, sir; that note is now in the bank.

Q. And that too was renewed from time to time by Mr. Hensey as a matter of accommodation to Mertens and Agnew?

Mr. MERILLAT: Is it considered that the objection we have
31 previously entered may be considered as made of record to all of this testimony, for the questions are absolutely the same.

Mr. WOODARD: Yes, sir; but you don't have to enter objections to immaterial evidence.

Mr. MERILLAT: It is a good deal better to have them on the record. At any rate, we won't take any issue on that now.

(Hereupon the question was read.)

A. Yes, sir.

Q. Are there any other notes in existence given you by Mr. Melville Hensey other than the five hundred dollar note which you have just spoken of as being at Alexandria which are still discounted?

A. I do not know.

Q. Mr. Mertens, I will ask you to secure and produce, so far as you know, any notes which you have been given by Mr. Hensey in the past, and also to have a list made up of any notes which may be now discounted bearing his signature, and the endorsement of Mertens and Agnew, and arising out of this particular transaction; that is to say, which were renewals of notes given in payment of brick delivered in the Kellogg and Hensey contract?

Mr. MERILLAT: *Consul* desires to say that they will give notice that they will object to any list, but that they will go to any place that may be needed for them to go in order that the notes themselves may be produced.

By Mr. WOODARD:

Q. At this time, Mr. Mertens, do you recall that any of these notes which you have produced have been renewed and are evidenced by other notes given in their place? What is your best information about that?

A. I know that we are getting that account—for instance, those notes up to the present time are being sent to us as they come along and as they are due to Cumberland.

Q. I do not think you understand me. For instance, take this note of December 17th, 1906, for five hundred dollars, and payable three months after date. Was not there a note given by Mr. Hensey, as an accommodation or otherwise, to take up this note at the time it fell due?

A. Yes sir.

Q. Where is that note?

A. That must be in Cumberland or you have it there.

Q. They are still there?

A. Yes, sir.

Q. And these are the notes that immediately precede the ones that are now discounted at Cumberland. That is correct?

A. Yes, sir.

Mr. MERILLAT: The previous objection, of course, is renewed.

Mr. WOODARD: Yes, sir; that is understood. Now, such being the case, I object to the entire line of the direct examination which in any way related to any of the notes which have been produced, and will move to strike out the testimony having reference thereto.

WITNESS: Mr. Woodard, would you like me to explain why those notes are being renewed that way, or is that material.

Mr. WOODARD: I would like to have you explain.

32 WITNESS: I would like to explain to these gentlemen so that they will know.

Mr. WOODARD: Just explain so that it may go on the record.

WITNESS: For instance, last January—Mr. Agnew and I took that yard out there to save ourselves. Here — all the notes that are held in Cumberland by F. Mertens and Son, of which I am one of the firm. F. Mertens and Sons are carrying that paper in Cumberland. F. Mertens and Son have charged Mr. Agnew and myself up with the interest on these notes the same as if we borrowed it out of the banks. You understand, now, the interest on the notes amounted, when this statement was made up—it was fixed up here for two years. It was $822.96. The notes are carried in Cumberland by F. Mertens and Sons and are charged up against Mertens and Agnew. These notes take the place of those right along as they are kept up. Now, if we ever get the money on this claim then Mertens and Agnew will pay F. Mertens and Sons for the notes they have in Cumberland and John P. Agnew and Company will get the note that they have of five hundred dollars.

By Mr. WOODARD:

Q. In other words, when you get the fund to which you are entitled in the suit against the Mercantile Trust Company that fund will be used for the purpose of liquidating these various notes?

A. That is right.

Q. Now, Mr. Mertens, I show you a contract of assignment bearing date the 21st day of October, 1903, signed by Melville D. Hensey, and also an agreement of the same date between Frederick Mertens and Park Agnew and Melville D. Hensey, and ask you if there was any other agreement between you and Mr. Melville Hensey other than the agreement represented in those two papers.

Mr. MERILLAT: It is desired to object if the purpose is to contradict the written instruments.

Mr. WOODARD: The desire is to answer the allegation contained in the bill of complaint in this cause—contained in the last paragraph of the bill filed in this cause which alleges that there was a secret agreement and arrangement between the parties.

Mr. MERILLAT: That is sufficiently answered by the recording of the one and the non-recording of the other assignment.

(Hereupon the question was read.)

A. Not as I know of.

Q. Mr. Mertens, I hand you a paper simply for the purpose of convenience to refresh your recollection and ask you to answer the aggregate amount due Mertens and Agnew on account of the various notes of which we have been talking, including the interest to this date?

Mr. MERILLAT: Objected to for the reason that the witness and counsel declined to produce the original of these papers, and
33 that this is not the best evidence, and we will move to strike out the entire paper and answer.

Mr. WOODARD: I am not going to introduce the paper. It is matter of convenience as to whether we shall take each individual note and add it up or not.

Mr. MERILLAT: And further objected to. Any answer of the witness based on an examination of a paper which is not the original and which is not in evidence is objected to.

(Hereupon the question was read.)

Q. You may state, if you like, what is the aggregate amount of the notes that you hold?

A. The notes we have in Cumberland?

Q. I am speaking of Mertens and Agnew—the aggregate amount of notes held by Mertens and Agnew bearing the signature of Melville D. Hensey?

A. This statement that we have here does not give it all. Mr. Agnew's note is not on here.

Q. State the aggregate amount of notes that you hold in Cumberland?

A. $7,358.00.

Q. And what is the aggregate amount of interest on those notes?

A. It makes $10,565.49.

Q. The amount that you have last given us includes the principal of the notes and the interest?

A. Yes, sir.

Q. And do I understand you that in addition to that there is still one note at Alexandria that Mr. Agnew had discounted?

A. Yes, sir.

Q. For the firm?

A. Yes, sir.

Q. And that is for how much?

A. That is for five hundred dollars, and the interest is due on that since 1889.

Mr. AGNEW: 1899.

WITNESS: 1889 or 1899, I do not know which.

Mr. AGNEW: 1899. That was the year of the business.

WITNESS: Yes, sir; that is right, 1899.

Redirect examination.

By Mr. MERILLAT:

Q. Mr. Mertens, how many sets of notes on account of this transaction did you receive from Melville D. Hensey prior to the set which you have produced here in evidence?

A. I cannot tell you.

Q. Did you receive as many as three sets?

A. Oh, yes, sir; we received as many as thirteen sets I suppose, or more. They started in in 1899 and they have been renewed -long every ninety days.

Q. After they had been renewed, or after new notes were given—the first notes were given in 1899 or 1890, and when did you first get new notes?

A. We got them in 1899, I suppose, the first ones.

Q. I am asking you this question: is it not a fact that no renewals were made, but simply stamped on the back of the original notes given you, and that these were the first notes that you have received since the original notes were given?

A. The ones you have got there in your hands?

34 Q. Yes, sir.

A. Let me see. How can that be? See here is a note in *1806* and the business started in 1899? How could that be the first note?

Q. I asked you a question and I think there is a misunderstanding on your part. After you got the first set of notes in 1899, when did you get the next set of new notes?

Mr. WOODARD: He testified every ninety days they were renewed.

Mr. MERILLAT: Pardon me one moment.

A. In 1899 the note business started off.

Q. Yes, sir.

A. And every thirty days after that Melville D. Hensey——

Mr. WOODARD: Every thirty days?

Mr. MERILLAT: I object to the counsel interrupting the witness.

A. (continued). Every three months Melville Hensey would send us notes and he is doing it to this day.

Q. Then, as I understand it, in 1899 he sent you the first batch of notes and then ninety days afterwards he sent you a new batch of notes. Is that correct?

A. Here is what I mean to say in plain words. December 15th he gave us a new note for five hundred dollars.

Mr. WOODARD: What year?

A. (continued). In 1899, which was for five hundred dollars, December 18th. We got another note for two hundred and fifty dollars and so on down the line. When that first note came due March 15th, three months afterwards, he sent us another note. That is the way this thing has been running along up to this time.

Q. Well, how does it happen, then, as to these notes which you have introduced here, new notes have not been given, but simply stamped on the back?

A. I suppose you want to know how you got that batch of notes. We got his telephone message——

Mr. WOODARD: Answer the question.

Q. From what have you been testifying as to these notes? Have you been testifying from a paper that you hold in your hand—a statement made by you?

A. I am holding a statement here in my hand that was made up last night by our bookkeeper.

Q. Is it made up from the books of Mertens and Agnew?

A. F. Mertens and Sons.

Q. It is made up from the books of F. Mertens and Sons? Is that correct?

A. This is here as being a charge against Mr. Mertens and Mr. Agnew.

Q. So F. Mertens and Sons have books of account of this transaction. Is that correct?

A. Not a bit of it. They have not got anything of the kind. F. Mertens and Sons in Cumberland advanced money on these notes and they are holding them until they get it back from F. Mertens and Park Agnew.

Q. As I understand you, then, you are a member of the firm of F. Mertens and Sons?

A. Yes, sir.

35 Q. And Mertens and Sons took over the notes of Mertens and Agnew that were given them by Melville Hensey. Is that correct?

A. I did it, F. Mertens.

Q. And you have an account book showing those transactions, have you?

A. I do not know whether we have an account book showing that or not. We have got myself charged with advancing that much money.

Q. Did either F. Mertens and Sons or Mertens and Agnew, or does any one for them or over whom they have any control, have a book or books of account of your dealings with Melville Hensey?

A. No, sir; the only things we have got are these notes.

Q. What, if any, evidence do you have if ever any claim should be made that any of these notes were the result of a misunderstanding of the account as to what was the true indebtedness of Melville Hensey to you?

A. The notes speak for themselves.

Q. Have you anything other than the notes themselves if there was any claim made that any of the notes had been given as a result of a mistake and that that amount was not due? Have you anything; that is, any accounts or anything whereby you could show that the notes were as a matter of fact the true amount due?

Mr. WOODARD: The witness has answered that at least five times that he has not.

A. You have got the paper there of what it is.

Q. You mean I have got the notes?

A. Yes, sir; you have got the notes?

Q. That is the best answer you can give?

A. Yes, sir.

Q. Where were these assignments agreed to and signed that have been put in evidence here?

A. In our attorneys' office.

Q. Who is that?

A. Messrs. Birney and Woodard.

Q. Who was present at that time?

A. Mr. Hensey was present and myself.

Q. Who else?

A. I do not know who else. Our attorneys.

Q. And who else?

A. I don't think anybody was present.

Q. Was Mr. Agnew present?

A. He might have been there. He must have been there or he could not have signed that paper.

Q. What was done with the papers or assignments that were signed?

A. They were left with our attorneys.

Q. Now, Melville Hensey originally recovered a judgment for over eighteen thousand dollars. Who was to get the difference between the amount of your claim and any judgment that he should obtain if it should run to eighteen thousand dollars or more? That is to say, if it should run more than the amount of your claim against Melville Hensey, who was to get the balance over and above that?

Mr. WOODARD: I object to that question because the contract which has been introduced in evidence states for itself and any answer that this witness might make could not vary that instrument.

Mr. MERILLAT: Please answer, Mr. Mertens.

36 A. I would think that we would have gotten it.

Q. As a matter of fact, do you not know that Melville Hensey had creditors at the time of that assignment other than yourself?

Mr. WOODARD: Objected to as calling for something that the witness has already answered several times and said that he did not know anything about.

A. No, sir; I do not know anything about it.

Q. In answer to one question put to you by Mr. Woodard you said these notes in question were made for your convenience. What did you mean by the words "for your convenience?"

A. I mean to say that in 1899 we did not have as much money as we have got now and we had to use them in bank to pay our indebtedness.

FREDERICK MERTENS.

Signed for the witness by me by consent and agreement of counsel, this 2nd day of October, 1907.

EDWIN L. WILSON, *Examiner.*

PARK AGNEW, recalled, testified as follows:

By Mr. MERILLAT:

Q. Mr. Agnew, were you present at the time that certain assignments were made from Melville Hensey to Mertens and Agnew?

A. I cannot say that I was present when these assignments were executed. I recall being present at Mr. Woodard's office on the occasion when they were there and the matter was discussed.

Q. Now, please state what was said at that time by yourself—either by you to Melville Hensey or by Melville Hensey to you?

Mr. WOODARD: I object to any answer upon the part of this witness or any conversation which took place which resulted in the contracts which have been introduced in evidence. Those contracts represent the results of those interviews and talks and anything beyond that I object to.

Q. Now, please give that conversation that occurred?

A. I could not give you the conversation because I was not taking a part in it. I simply was there by invitation of Mr. Mertens. I did not know anything about the facts or the details of the transaction between Mr. Hensey and the firm of Mertens and Agnew, and all the recollection I have is being at Mr. Woodard's office on one occasion when Mr. Melville Hensey and a brother of Mr. Hensey's, and Mr. Woodard and Mr. Mertens and myself were there, and his affairs was the matter of discussion between Mr. Hensey and his brother and I believe our attorney, Mr. Woodard. As to the details of the conversation I cannot tell you anything about. I only know it was about his affairs—about his dealings with Mertens and Agnew. I took no impression in regard to it and knew nothing about it.

Q. How did the sum of two hundred and fifty dollars come to be paid to Melville Hensey?

A. I cannot tell you, sir. I had nothing to do with it.
37 Q. Were you present when that was talked over?
A. No, sir.

Q. Is that your signature to the assignments which have been put in the record?

A. Yes, sir.

Q. Were all the three parties present at one and the same time when those signatures were appended to that paper?

A. My impression is, sir, that I signed that agreement in my Washington office on New York Avenue. Mr. Mertens brought it to me. I have no recollection of being present when Mr. Mertens and Mr. Hensey executed that.

Q. Have you any knowledge either derived from that conversation or derived from anything that Mr. Mertens had at any time said as to how or why that two hundred and fifty dollars was paid to Melville Hensey?

A. No, sir.

Q. Did you know that it had been paid to him?

A. The two hundred and fifty dollars?

Q. Yes, sir; as a consideration for his making the assignment to you?

A. As a consideration for the assignment?

Q. Yes, sir.

A. I cannot say that I do.

Q. Well, what, if any, knowledge have you as to how it was paid to him and why it was paid to him?

A. I cannot say now that I have any. I had nothing to do with this transaction personally between Mr. Hensey and Mr. Mertens and did not certainly ask Mr. Mertens any questions about it.

Q. What was said as to Melville Hensey's affairs at this conversation at which you were present when his affairs were under discussion?

Mr. WOODARD: Objected to, if any conversation is to be given which resulted in the contract.

A. I do not recall that conversation except generalities about Mr. Hensey. I did not hear all of that. It was between the attorneys.

Q. Was the subject of discussion how he could pay you what he owed you?

A. I could not say that it was.

Q. Did it concern what, if any, property he had?

A. It concerned Mr. Hensey's affairs.

Q. Did it concern his debts?

A. I suppose that is about the only thing it concerned, but I could not swear to that.

Q. You say his debts was the only thing it concerned?

A. I say I suppose it was.

Q. Was any inquiry made to ascertain what, if any, assets he had?

A. I do not recall. This meeting when I was present, as I told you, his brother was there and Mr. Woodard, occupying two offices, and part of the time I was in talking to Mr. Birney. There wasn't

anything that I was paying any particular attention to individually, and, therefore, I am not in a situation to make any statements that would be facts.

Q. Well, when was it that you first learned that Melville Hensey owed you any money, or owed Mertens and Agnew any money?

A. I could not tell you when it was. I could not remember the dates or anything like that.

Q. Well, as near as you can.

38 A. I could not tell you. The first time I ever heard it was one Sunday evening I was calling on Mr. Mertens some years ago and Mr. Hensey came to see him. I think it was something about getting something that was due. That is about the first recollection I had of it.

Q. What did he say?

A. I could not tell you that. The conversation took place between Mr. Mertens and Mr. Hensey and Mr. Mertens said he wanted his money that was due us.

Q. Did you know of the giving of these notes originally?

A. Nothing except the one that I handled in Alexandria.

Q. What was the date of that—the first date?

A. I could not give you that. I would have to look back at the records to see when I first handled it. It has been some time. I cannot tell you that.

Q. Did Mr. Mertens communicate with you the fact—I will ask you this: Is it not a fact, Mr. Agnew, that you come up here to Washington from Alexandria about every day and have an office in Washington?

A. I am the senior member of the firm of John P. Agnew and Company and have offices on New York Avenue, but it is not a fact that I come over here every day in succession. I might come up every day for a while and then I might not come for an interval of four or five days.

Q. You do maintain an office in Washington?

A. Yes, sir.

Q. Now, did Mr. Mertens communicate to you the fact that the notes of Melville Hensey were coming back unpaid and unmet?

A. I got that from the fact of the note I had, that that note was being renewed.

Q. You knew that as a matter of fact, did you not, either at the time or very soon after the first note was unpaid?

A. I cannot answer as to knowing anything about that first note being paid. I do not know anything about the notes that Mr. Mertens was handling.

Q. Was not there from time to time a discussion between you and Mr. Mertens as to your financial affairs and who were your debtors on account of brick furnished?

A. No, sir.

Q. None at all?

A. No, sir; no more about Mr. Hensey than anybody else.

Q. I was not asking that. I was asking if you and Mr. Mertens

from time to time during these past years would have discussions about your business dealings and the people who owed you money?

A. No, sir; I have no idea who owes the firm of Mertens and Agnew. I never asked Mr. Mertens any questions about it.

Q. Did you make any inquiries concerning Melville Hensey or what, if any, assets he had?

A. No, sir.

Q. None at all?

A. No, sir.

Q. Did you ever learn anything concerning his affairs, and, if so, what?

A. I never knew anything at all about Mr. Melville Hensey's affairs. Of course, I knew, as I supposed, Mr. Hensey was in some sort of financial trouble because he was renewing the notes and because he owed us.

Q. Did you know or have any reason to believe that he owed other people besides yourself?

A. No, sir; I knew nothing about his other affairs.

39 Q. Did you make any inquiries to ascertain that fact?

A. No, sir.

Q. Did you leave the matter in the hands of your attorneys?

A. That was absolutely in the hands of Mr. Mertens who attended to all the business.

Q. When did you first learn that a syndicate, or did you at any time learn that Mr. Melville Hensey had been sued along with his father and one Hooker on account of some frauds he had perpetrated against a syndicate?

A. Nothing, except what I saw was in the Washington papers.

Q. When did you see it in the Washington papers?

A. I could not tell you the dates, but I recollect reading it in the Post.

Q. Was that at the time the suit was brought?

A. I could not answer that question without refreshing my recollection as to the dates.

Mr. WOODARD: I object to this line of examination as being purely hearsay on the part of this witness, statements made from some articles that he thinks he saw, or did see, in the newspapers.

Q. You do as a matter of fact read the Post, do you not, Mr. Agnew?

A. I read the Post very religiously, almost as much as I do the Alexandria Gazette.

Q. Was the article that you saw in the Post quite a long item?

Mr. WOODARD: Objected to as being irrelevant and immaterial.

A. I don't think it was. It was a quarter of a column or something like that.

Q. It stated, did it not, that suit had been entered against Mr. Melville Hensey and his father and Hooker on account of some frauds in connection with the purchase of some land in Le Droit Park?

Mr. WOODARD: Objected to as immaterial and irrelevant, and the witness is advised that it is not necessary for him to answer unless he wishes to.

A. My recollection is that his name was among the number mentioned in that article.

Q. Did the article speak of a suit having been just entered?

Mr. WOODARD: Objected to as immaterial and irrelevant.

A. I am not positive about what it spoke of or what it said about the suit. I recollect that it referred to that matter.

Q. Now, as a matter of fact, was not that article you read in the summer preceding the assignment to you?

A. I could not answer that.

Q. Do you know how it happened that Mertens and Agnew advanced to Melville Hensey the costs of this suit—the costs of this suit against the Mercantile Trust Company?

A. I know nothing about it except so far as Mr. Mertens transacted the business.

Q. What, if anything, did Mr. Mertens tell you as to that matter?

A. I don't think he ever told me anything beyond the fact that we would have to pay the expenses of the suit.

40 Q. Did he say why you would have to pay the expenses of the suit?

A. I have no recollection of any details of it other than what I have stated.

Q. Did he say anything about it, or about having advanced two hundred and fifty dollars to Melville Hensey?

Mr. WOODARD: Objected to because the witness has already testified in reference to the two hundred and fifty dollars and said that he did not know anything about it.

A. No, sir; I do not know anything about it.

Q. Do Mertens and Agnew keep books of account of their dealings with persons to whom they sell brick?

A. Not to my knowledge.

Q. Do they keep books of account at all?

A. Not to my knowledge.

Q. Have you never seen the books of account of Mertens and Agnew?

A. No, sir.

Q. Do I understand that you have never seen the books of the firm of which you are a member?

A. Yes, sir.

Q. Has Mr. Mertens ever told you that they did have books of account?

A. No, sir.

Q. How long a time has the firm been in existence?

A. I could not answer that without looking at the records. When a man gets crawling up to sixty years of age, the years then go by so rapidly I would not like to state.

Q. Approximate to the best of your recollection?

A. I could not do that.
Q. It has been several years?
A. Yes, sir; several years, but I do not know how many. There is a record of it somewhere.
Q. As much as ten years?
A. I could not answer that and would not undertake to do it.
Q. Were you at any time a party to an agreement with other creditors of Melville Hensey whereby a statement was made—a statement of their claims—and it was agreed that some one should handle those claims and act in the capacity of a trustee or agent and settle them up if anything could be gotten out of Melville Hensey?

Mr. WOODARD: Objected to because if there is a written agreement of record it should be produced and anything that this witness might say could not alter that record.

Mr. MERILLAT: We are not seeking the contents of that record, but whether or not the witness was a party to it or had any knowledge of it.

A. No, sir.
Q. Have you any knowledge of what became of either of these assignments after they were turned over to your attorney?
A. No, sir.
Q. Or after you signed it?
A. No, sir.
Q. When did you get the first note from Melville Hensey?
A. I could not answer that from my memory. I would not undertake to do it.
41 Q. Have you gotten more than one note from him?
A. Have got renewals.
Q. How frequently?
A. Every three months.
Q. From the time the first note was given, do I understand, then, that you got new notes each time?
A. Every three months.
Q. What was done with the old ones?
A. As far as I know they were returned to either Mr. Mertens or Mr. Eberly, the clerk out at the yard, and he gave them to Mr. Hensey.
Q. Now, was the time you got the first note along about 1899 or 1900?
A. I could not answer that question. It is a matter I can verify.
Q. Will you rerify it?
A. Certainly I will.

Mr. MERILLAT: That is all until this matter is verified and the witness is able to say when he got the first note and then I will want to ask him some other questions. You can either cross examine him now or wait.

Mr. WOODARD: I haven't any questions to ask.

PARK AGNEW.

Signed for the witness by me by consent of counsel, this 2nd day of October, A. D. 1907.

EDWIN L. WILSON, *Examiner.*

HENRY F. WOODARD, called as a witness for the complainants, and being duly sworn, testified as follows:

By Mr. MERILLAT:

Q. State your name, your occupation and connection with the firm of Birney and Woodard?

A. I am a member of the firm of Birney and Woodard, lawyers.

Q. When was your attention first called, as nearly as you can recollect, to a claim of Mertens and Agnew against Melville Hensey?

A. I cannot recall absolutely now, but I think it was about the time or prior to the time when the first suit was filed in reference to certain houses up on Washington Heights.

Q. And that date you are willing may be supplied in the record?

A. Yes, sir.

Q. It was prior to that?

A. It must have been prior to that date.

Q. Did you at that time learn that Melville Hensey's notes were being returned unpaid—his notes that he had given to Mertens and Agnew?

A. I don't think I knew anything about the notes at that time.

Q. I will ask you whether or not at this time Mertens and Agnew put in your hands the debt that they had against Melville Hensey?

A. You are speaking about the time prior to the filing of that first equity bill.

Q. I want to know approximately when it was that you had first placed in your hands the claim that they had against Melville Hensey?

A. I could not tell you just the time. It was prior to the date of this agreement here.

Q. How long prior?

A. I could not tell you.

42 Q. A year?

A. I would be unable to say, Mr. Merillat.

Q. Was it as much as three years?

A. I could not say. If I should say three years or one year, *and* I might be mistaken in either case, and therefore I do not think it is safe to say either.

Q. Were you aware of the fact of what is known as the Le Droit Park Syndicate suit against Melville Hensey?

A. No, sir; I never had any connection or knowledge of that suit at all.

Q. Were you at any time counsel for Melville Hensey or your firm?

A. I suppose we were.

Q. When?

A. We used his name as complainant along with Mertens and Agnew.

Q. Were you at any time his attorney—in what respect now are you referring?

A. I am now referring to the suit which was filed in reference to the sale of some houses on Washington Heights.

Q. Were you then Melville Hensey's attorney?

A. He never paid us any attorney fee, but he was the complainant named in the bill and it may be that Mertens and Agnew were also named as complainants. I do not recollect now.

Q. Did you at that time look into Melville Hensey's affairs?

A. No, sir; I cannot say that I did.

Q. You knew that other people had claims against him besides Mertens and Agnew?

A. No, sir; I knew nothing about that.

Q. Did not that suit itself develop the fact that there were others having claims against him?

A. I cannot tell you, Mr. Merillat. It has been so long ago I could not tell you. I can just give you a kind of scheme of the bill or something of that kind. I know that we were after an injunction to prevent the sale of some houses.

Q. Were you party to an agreement whereby several creditors of Melville Hensey put their affairs in the hands of an attorney for the purpose of seeing what could be gotten out and dividing any proceeds among the several parties entitled?

A. I do not remember really. If there is such an agreement and you will show it to me I can tell you.

Q. Did you ever see Bates Warren or Hayden Johnson concerning the matter of the claims against Melville Hensey growing out of the construction of houses on Washington Heights and the other houses?

A. I may have, but I have no recollection now, but I saw Bates Warren in connection with testifying in the law suit against the Mercantile Trust Company.

Q. Did you ever make any effort to collect the debt that Mertens and Agnew had against Melville Hensey prior to the time of this assignment that is now in evidence?

A. No, sir; I don't think so.

Q. The claim was in your hands as a matter of fact sometime prior to that?

A. I cannot recollect. I recollect that Mr. Hensey was to turn this account over for the security of Mertens and Agnew and that Mertens and Agnew were to supply the funds to prosecute it and to pay the attorneys and that they were to be paid their claim—well, it is in the agreement all that they agreed to. It was in black and white.

Q. What, if anything, was said as to why Mertens and
43 Agnew should advance the costs of suit?

A. I do not recollect that anything was said except that it was to form part of the agreement. I don't think that Hensey was very much inclined to sue.

Q. Was discussion of Melville Hensey's affairs had while Mr. Agnew was present and Mr. Mertens?

A. No, sir.

Q. And Melville Hensey's brother?

A. Mr. Agnew said he was there, but I have forgotten. I would not be prepared to say whether he was or not.

Q. Was there any discussion of Melville Hensey's affairs at that discussion?

A. I do not recollect.

Q. How did that two hundred and fifty dollars come to be advanced to Melville Hensey?

A. Melville Hensey wanted it and I advised Mr. Mertens to let him have it. That is all there was to that.

Q. Was that two hundred and fifty dollars advanced prior to the time of this assignment or at the time?

A. About the time; yes, sir.

Q. It was then at or about the time—either immediately prior to or at the time he signed this assignment that this two hundred and fifty dollars was advanced?

A. My recollection is it was not prior to the time.

Q. Was it understood that it was to be given him at the time he ade the assignment?

A. It was done.

Q. And he was rather reluctant to bring the suit. Is that a fact?

A. I do not think Mr. Hensey would have brought the suit.

Q. If the two hundred and fifty dollars had not been given?

A. I do not think the two hundred and fifty dollars had anything to do with that at all. I don't think he would have brought the suit. And we advised Mr. Mertens that we thought we could make the money and we asked Mr. Hensey to transfer the account to Mertens and Agnew and this agreement was the result of it. I do not think he ever thought we could make the money.

Q. The assignment where he was to keep any money over and above the amount of Mertens and Agnew's claim was not put of record, was it?

A. Well, there was not any occasion to put that of record.

Q. The other paper was put of record, was it not?

A. Yes, sir; we put just part of the assignment which was necessary to protect the interests of Mertens and Agnew. We never suspected at the time, Mr. Merillat, that there would be any money over. It never dawned on us that we would be that successful.

Q. You know, as a matter of fact, that eighteen thousand dollars was once awarded?

A. The jury awarded us eighteen thousand dollars and the Court promptly took it away from us, and I might say in that connection that this case went to the Court of Appeals, and the judge there said that the verdict was excessive and so stated in his opinion. We really never thought we would get as much as eight thousand dollars. I suppose you know it was a very hard fought case.

Q. At whose direction was it that this clause was put in there stating that any amount over and above the claim of Mertens
44 and Agnew should be paid over to Melville Hensey?

A. I could not tell you. I probably wrote it or dictated both of the papers.

Q. That suit you filed was for the sum of fifty thousand dollars, was it not?

A. That was the amount of the bond.

Q. And the damages stated in your suit were stated at fifty thousand dollars, is that not true?

A. I do not recollect.

Q. Is that not true?

A. I know we claimed some sixteen thousand dollars for overtime and the balance was for commissions and defects in the work.

Q. How much did you claim all-told?

A. I think it was more than fifty thousand dollars. Of course, we could not have recovered more than fifty thousand dollars.

Q. But you did claim that the Mercantile Trust Company because of various defaults owed you more than fifty thousand dollars?

A. Yes, sir; we did. Mr. Merillat, what most all of the lawyers do, we went in for all that we could, but there is a vast difference between what you ask for and what you get.

Mr. MERILLAT: That is all.

WITNESS: I simply say that this contract that was entered into between the parties was all done in good faith and without any intention whatever of affecting the rights of others.

Mr. MERILLAT: We move to strike out the statement of the witness and the declaration of the witness as to good faith and intent.

HENRY F. WOODARD.

Signed for the witness by me by consent and agreement of counsel, this 2nd day of October, 1907.

EDWIN L. WILSON, *Examiner.*

Hereupon the further taking of testimony in this cause and on this behalf was adjourned until Thursday, May 23rd, 1907, to meet at three (3) o'clock P. M., at the same place.

EDWIN L. WILSON, *Examiner.*

WASHINGTON, D. C., *May 23rd,* 1907.
THURSDAY, at 3 o'clock.

Met pursuant to adjournment next hereinbefore noted at the same place for the purpose of taking additional testimony for and on behalf of the complainants.

Present: Messrs. Chas. M. Merillat and Mason N. Richardson for the complainants. Henry F. Woodard, Esq., for the defendants; Examiner and witnesses.

Mr. MERILLAT: We desire to offer in evidence from the records of the Supreme Court of the District of Columbia the bill for injunction known as Equity number 22,483, filed by Melville D. Hensey, Frederick Mertens and Park Agnew, trading as Mertens and Agnew, complainants, against The Mercantile Trust Company, a corporation, Percy H. Russell and Hayden Johnson, trustee; Brainard H. Warner, Clarence B. Rheem, Samuel Ross and Thomas R. Riley and Bates Warren, defendants, and will produce—give notice that we will produce the original record at the hearing, and ask that there be copied into the record paragraph three of said bill.

Mr. WOODARD: Objected to on the ground that the entire record only is admissible and that no segregated part is admissible.

Mr. MERILLAT: We offer, then, the entire record of the proceedings in this cause and ask that it be noted as an exhibit filed in this case and as a part of the cause and give notice that we will produce the original record at the hearing.

Mr. WOODARD: Objected to because the record is immaterial and irrelevant to any of the issues in this cause.

Mr. MERILLAT: We file in lieu of the iriginal records the transcript of record of this cause as it went to the Court of Appeals which was made up and agreed to by the parties.

Mr. WOODARD: Objected to for the same reason.

Mr. RICHARDSON: Let the third paragraph of said bill be copied into the record at this point.

Said transcript of record in the Court of Appeals of the District of Columbia in said cause is hereto attached as an exhibit marked Complainants' exhibit A, and paragraph three of the original bill in equity cause number 22,483, filed in the Supreme Court of the District of Columbia, and requested to be copied into the record, is in words and figures following, to-wit:

"3. That heretofore, to wit, during the year 1898, and long prior thereto, Seymour W. Tulloch, Henry V. Tulloch, and Miranda Tulloch were the owners in fee-simple of twenty-one (21) certain pieces or parcels of ground in Tulloch's et al. sub-division of lots in Washington Heights, in the city of Washington, District of Columbia, and, being so seized, did by their deed convey fifteen (15) of said lots or parcels of ground, to wit, lots numbered thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), and thirty-five (35), in block numbered three (3), and lots numbered twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-four (34), and thirty-five (35), in block numbered six (6), and lots numbered thirty-two (32) and thirty-four (34), in block numbered five (5), and lots numbered twenty-seven (27) and thirty-eight (38), in block numbered six (6), of said Tulloch's et al. subdivision of lots in Washington Heights, in said county and District, to one Edgar C. Kellogg, in consideration and upon the agreement of said Kellogg to erect upon six (6) other certain lots belonging to the said Seymour W. Tulloch, Henry V. Tulloch and Miranda Tulloch, six (6) certain buildings in accordance with certain plans and specifications prepared therefor; that thereafter said Kellogg conveyed said fifteen (15) lots to certain trustees, not necessary to be herein named, to secure certain sums of money by him borrowed in the nature of building loans, which said moneys were to be used in and about the construction and erection of said six (6) houses for the said Tullochs, as well also fifteen (15) other houses which he desired to erect and construct on the lots or parcels of ground hereinbefore set out; that the said Kellogg also entered into a bond or bonds to secure the carrying out of this agreement to erect said houses, upon which said bond the defendants Rose and Riley and one Escher and
46 O'Donnell were sureties; that thereafter the said Kellogg entered upon the said premises hereinbefore described and

caused to be partially erected the said twentyone (21) houses and received as advancements on the builders' loans under the deeds of trust hereinbefore mentioned the sum of $52,416.00; that thereafter the said Kellogg abandoned the work upon all of the aforesaid houses and departed to parts unknown; that the time for the completion of the said houses having expired and the interest upon said deeds of trust being in default, the said lots and parcels of ground hereinbefore enumerated and set out, together with the partially constructed buildings thereon, were sold at public auction by the trustees under the deeds of trust given to secure the persons or corporation who had made the builders' loans, and the said houses and parcels of ground were, by agreement bought in by the defendant Bates Warren to be by him thereafter held and disposed of under the terms and conditions of a certain agreement, which was afterwards reduced to writing and bears date January 24th, 1900, a copy of which said contract is appended hereto, marked "Complainants' Exhibit A," and it is prayed to be considered, as far as may be necessary, as a part of this bill; that by the terms and conditions of said contract it was also provided and agreed that the said defendant, Bates Warren, should convey, and he did so convey, the said fifteen (15) lots or parcels of ground by him purchased as trustee to your complainant Hensey for the purpose of carrying into effect the terms of said contract between the defendants Ross and Riley and your complainant Hensey, and to enable the said Hensey to raise by deeds of trust the necessary funds, and to provide the necessary materials to carry out said agreement, and it was also by said agreement, among other things, provided that the said defendants, Bates Warren, and the complainant Melville D. Hensey take certain interests in said lots and premises hereinbefore described as trustees for certain creditors who had heretofore furnished materials and labor to the said Kellogg in and about the erection of said buildings, and for which the said Hensey had become and made himself liable; that articles one, two, three, four and five of the contract hereinbefore referred to provided for the distribution of any funds that should come into the possession of the defendant Bates Warren, as trustee, and under article four of said contract, which said clause reads as follows: "To the payment of the claims of persons who have already provided money for the labor and materials for the said houses, and who have already furnished materials for and performed labor upon the aforesaid houses and who have signed or caused to be signed an agreement to release liens, bearing date the 24th day of January, 1900, now in the possession of the said Bates Warren;" that your complainants Frederick Mertens and Park Agnew are included among these creditors referred to in said article four of the said contract of January 24th, 1900, and are beneficially interested in said property described and set out in said contract, the equitable title to which was by deed from your complainant Hensey, but is now vested in the defendant Warren, in that they heretofore furnished brick to said Kellogg, upon the credit of the

said Kellogg and the complainant Hensey, to the value of an
47 amount largely in excess of $7,300.00, all of which said amount, however, has been paid to the said Mertens and Agnew except that sum; that said Hensey and said Kellogg admitted said amount to be due; that the said Brick by the said Mertens and Agnew so furnished to the said Kellogg and Hensey were delivered to be used and were so used, as complainants believe, in the construction and erection of the houses upon the lots and parcels of ground hereinbefore set out, to wit, the twenty-one (21) houses agreed to be erected, and they aver that they are parties in interest under said contract, and entitled to share in the proceeds of the sale of said lots and the improvements erected thereon to the extent reserved to them and other creditors under said contract; that your complainants Mertens and Agnew never in fact signed the agreement referred — in paragraph four of said contract, but signified their willingness to do so."

Mr. MERILLAT: We desire to offer in evidence the bill in Equity cause known as Equity number 24,084, entitled Charles W. Richardson, et al. against Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, defendants filed, as shown by the marks of the Clerk, July 1t8h, 1903, and will produce the same at the hearing.

A copy of the original bill (with the amended bill thereto) filed in Equity cause number 24,084 in the Supreme Court of the District of Columbia is attached hereto and filed with this testimony beginning at page 107 of this record, and is marked for identification as complainants' Exhibit B.

Mr. MERILLAT: We also desire to offer in evidence from the original records of the Supreme Court of the District of Columbia the decree signed by the Court and filed May 28th, 1906, and also the supplemental decree thereto naming Mr. Mason N. Richardson as trustee in substitution of Mr. Thomas and will produce the originals at the hearing, but ask now that they be copied into this record.

Mr. WOODARD: Both offers are objected to as being immaterial and irrelevant to any issues in this cause and also for the reason that the complete records are not produced.

Mr. MERILLAT: We will file examined copies of the original records and have the Examiner mark them as exhibits in the cause.

Mr. WOODARD: Objected to for the same reasons and for the further reason that it does not appear that the papers offered are examined copies of the original papers.

Copies of the decree, and supplemental decree, rendered in equity cause number 24,084 pending in this Court, and just offered in evidence by counsel for the complainants are attached hereto and filed with this testimony beginning at page 101 of this record and the same are marked respectively for identification as complainants' exhibits C and D.

Mr. MERILLAT: We also desire to offer in evidence from the original records in the Supreme Court of the District of Columbia judgments rendered in said court as follows: A judgment by Samuel R. Church, Justice of the Peace, docketed in the Supreme Court

of the District of Columbia, being cause at law number 43,-
48 914 and entitled the Raritan Hollow Porous Brick Company, a corporation, vs. Melville D. Hensey, the judgment being for $250.74, having been rendered April 23rd, 1900.

Mr. WOODARD: The record of the Justice of the Peace in the case last recited is objected to because the entire record is not produced, and further because it is immaterial and irrelevant to any issues in this cause.

Mr. MERILLAT: We desire to state that we have offered the entire record and will produce the entire record at the hearing of this cause.

We also desire to offer in evidence the record of judgment in law number 43,682, entitled Francis A. Belt and William H. Dyer, co-partners trading as Belt and Dyer, vs. Edgar C. Kellogg and Melville D. Hensey, for $660.00, with interest from October 20th, 1899, rendered March 6th, 1900.

Mr. WOODARD: Objected to for the same reasons as stated in the preceding objection.

Mr. MERILLAT: We also desire to offer in evidence from the same records law number 44,605, entitled George C. Esher vs. Adam McCandlish and Melville D. Hensey, for $400.00 with interest from January 5th, 1900, and rendered June 11th, 1901.

Mr. WOODARD: Objected to for the same reasons.

Mr. MERILLAT: Also a judgment of the same court in cause at law number 44,286, entitled George C. Pumphrey, et al. vs. John W. Cranord and Melville D. Hensey and Edgar C. Kellogg, for $700.00, with interest on $450.00 from February 2nd, 1900, rendered December 10th, 1900.

Mr. WOODARD: Objected to for the same reasons, and the additional reason that the records being offered are not the primary evidence.

Mr. MERILLAT: We desire to give notice that we will produce the original records at the hearing.

We desire to offer in evidence from the records of the same court the precipe filed October 20th, 1903, in the Supreme Court of the District of Columbia in law number 44,822, entitled Melville D. Hensey, plaintiff, vs. The Mercantile Trust Company, a corporation, defendant, directing that the cause be entered to the use of Frederick Mertens and Park Agnew.

Mr. WOODARD: You have not read the whole of it.

Mr. MERILLAT: (Continuing:) Filed in the Supreme Court of the District of Columbia. It was dated the 15th day of February, 1902.

Mr. WOODARD: The precipe is dated the 15th day of February, 1902, and is signed by Melville D. Hensey, complainant, by Birney and Woodard, attorneys.

Mr. MERILLAT: We will offer in evidence the entire præcipe and ask that the Examiner incorporate it into the record and then return the same to the files.

Mr. WOODARD: It is dated the 15th day of February, 1902.

Mr. MERILLAT: The entire paper will be incorporated into the

record. We would like also to have these assignments incorporated in the record.

49 Mr. WOODARD: That has already been done. There is no use of putting them in again.

Mr. MERILLAT: I beg your pardon. I did not know that that had been done. I had not seen the record after being written up.

Mr. WOODARD: Now, let the whole paper go in the record. Just let the Examiner copy the whole præcipe in the record.

The precipe offered in evidence by counsel for the complainants is in words and figures following, to wit:

In the Supreme Court of the District of Columbia, the 15th day of February, 1902.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

The Clerk of said Court will please enter this cause to the use of Frederick Mertens and Park Agnew.

MELVILLE D. HENSEY,
Plaintiff.
BIRNEY & WOODARD,
Attorney- for Plaintiff.

Clerk's stamp on face: Filed Oct. 20/1903.

Endorsed on back: At Law, No. 44,822. Melville D. Hensey vs. Mercantile Trust Company.

Order for entry to use, etc.

Stamped on back by Clerk: Filed Oct. 20, 1903. John R. Young, Clerk.

Mr. MERILLAT: We also desire to offer in evidence specially, and ask the Examiner to copy and incorporate the same into the record from the minutes of the dockets of the Supreme Court of the District of Columbia, the two judgments rendered in the case of Melville D. Hensey vs. The Mercantile Trust Company—the two verdicts, I should say, rendered in that cause, and the judgment upon said verdict-; the first verdict for some eighteen thousand and odd dollars, and the second verdict, and the judgment upon said verdict for some eight thousand and odd dollars, and the mandate of the Supreme Court of the United States and of the Court of Appeals upon said judgment, and we will produce the original papers at the hearing of the cause.

Mr. WOODARD: All of the several offers are objected to for the following reasons: First, because the evidence proposed is immaterial and irrelevant to the issues in this case, and, secondly, because the offer is not in accordance with the usual and customary rules of evidence.

50 Said entries offered are as follows:

At Law. No. 44822.

MEVILLE D. HENSEY, to use of FREDERICK MERTENS and PARK AGNEW,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation.

* * * * * * *

1904 Feb. 1. Verdict for Pl'ff for $18,250 (M 45 p. 92.)
" " 12. New trial granted. (M 45 p. 105.)

* * * * * * *

1905 May 18. Verdict for Pl'ff for $8468.

* * * * * * *

1905 June 12. Motion for new trial and in arrest of judgment. Judgment on verdict for Pl'ff for $8468—with int. & costs. Appeal bond for costs filed at $100, or $12,000 for supersedeas and time to settle exceptions and file transcript extended to Sept. 30, '05. (M. 47 p. 86.)

* * * * * * *

1907 May 29. Mandate of Court of Appeals affirming Judg't. Filed.

* * * * * * *

Following are docket entries on docket number 4 of the Court of Appeals.

No. 1629, October Term, 1905.

THE MERCANTILE TRUST COMPANY, a Corporation, Appellant,
vs.
MELVILLE D. HENSEY.

* * * * * * *

1907, May 20. Mandate Supreme Court U. S. received.
" " " Mandate issued.

HENRY F. WOODARD, recalled on behalf of the complainants, testified as follows:

By Mr. MERILLAT:

Q. I would like to ask you whether or not the Melville D. Hensey who was a party to these equity proceedings and the law proceedings against the Mercantile Trust Company is the same Melville D. Hensey from whom you obtained the assignment?

A. He is.

Q. And are Fred-rick Mertens and Park Agnew the same Frederick Mertens and Park Agnew to whom the assignment was made and are defendants to this cause?

A. Yes, sir.

Q. And are mentioned in the bill of complaint in this cause?

A. Yes, sir; they are the same persons throughout.

51 Q. And also they are the same persons who are named as parties in equity cause number 22,483, entitled Hensey et al. vs. The Mercantile Trust Company?

A. Let me see what that cause is. I presume so.

HENRY F. WOODARD.

Signed for the witness by me by consent of counsel, this 2nd day of October, 1907.

EDWIN L. WILSON, *Examiner.*

PARK AGNEW, one of the defendants, heretofore sworn, was recalled by the complainants, and testified as follows:

By Mr. MERILLAT:

Q. I desire you, Mr. Agnew, to read from the files of the Washington Post of July 20th, 1903, which files are here produced and shown you, the item headed "Land Syndicate Suit," dealing with the action brought by Charles W. Richardson and others, against Thomas G. Hensey, Melville D. Hensey and Mellen C. Hooker, and we desire to ask you whether or not that is the article which you read in the papers as testified to at the last examination?

(Hereupon counsel produced the records of the Washington Post of date mentioned and exhibited same to the witness.)

A. That is the only thing I have seen since that time it seems to me. In regard to the article—whatever I thought it was my testimony indicated it was.

Mr. WOODARD: Just answer the question, Mr. Agnew. What is the question, Mr. Examiner.

(Hereupon the question was read.)

Mr. MERILLAT: The question is whether or not you read that article.

A. I could not testify that I read that article.

Q. Please state to the best of your recollection and belief whether or not you did see and read that article?

Mr. WOODARD: He has just testified that he did not.

Mr. MERILLAT: No, sir; he did not.

Mr. WOODARD: I so understood him. What was his answer, Mr. Wilson.

Mr. MERILLAT: He said he could not swear to it. He was asked to give his best recollection and belief.

A. My best recollection and belief is the article that I read was not such an elaborate article as that. I think my previous testimony will stand by it. I thought it was about a third of a column.

Q. At that date, Mr. Agnew, were you in Washington or Alexandria?

A. I could not say where I read it, but ninety-nine chances out of a hundred I read it in Alexandria. I am a subscriber to the

Post and get it daily and I generally read it at home before breakfast.

52 Q. At that time were you in the habit of reading, as you stated religiously, the Washington Post?

Mr. WOODARD: Objected to because the witness did not say that he read the Post religiously.

Mr. MERILLAT: Yes, sir, he did.

WITNESS: Yes, sir; I said I read it as religiously as I did the Alexandria Gazette.

Mr. WOODARD: I withdraw my objection.

Q. Was the purport of the article you read the same as the purport of that article?

Mr. WOODARD: Objected to unless the article is here.

Mr. MERILLAT: The article being produced here for your reading.

A. In substance; yes, sir.

Mr. MERILLAT: Then we desire to offer in evidence from the files of the Washington Post, and ask that it be copied as an exhibit in the cause, the article hereinbefore mentioned being in the Post of date Monday, July 20th, 1903, at page twelve.

Mr. WOODARD: Objected to as being immaterial and irrelevant, and further for the reason that the witness has not testified that he read the article in this paper, a copy of which is now offered in evidence.

Said article offered in evidence from the issue of the Washington Post of date July 20th, 1903, is in words and figures following, to wit:

Land Syndicate Suit.

Shareholders in Le Droit Park Deal Ask Accounting.

Cost of Property at Issue.

Thomas G. Hensey, Mellen C. Hooker, and Melville D. Hensey Named in Bill Filed by Parties Representing Twenty-one of Eighty-nine Shares—Removal of Trustees and Appointment of Receiver.

A suit to wind up the affairs of the Le Droit Park Land Syndicate, organized in the latter part of 1892, and the month of January, 1893, by Thomas G. Hensey and Mellen C. Hooker, real estate dealers in the city, aided by Melville D. Hensey, then an employé in his father's office, was filed in the Clerk's Office in the Supreme Court of the District just before the close of business on Saturday. The suit also seeks to compel an accounting from the three parties named with reference to their management of the affairs of the syndicate.

The complainants in the bill in equity are Drs. Charles W. Richardson, Joseph Little and W. A. Bevan, Miss Mary A. Heinz, of Pittsburg, Mr. F. H. Chittenden, of the Department of Agriculture,

Miss Mary B. Cummings, Mr. George C. Esher, Mr. Byron
53 Richards, and two or three others, representing in all, it is stated, some twenty-two shares out of eighty-nine shares outstanding. It is stated that a number of other shareholders probably will join with those who have brought the suit.

The property involved consists of some eleven houses on Florida Avenue built to sell at $7,000 each, and some 120,000 feet of ground on Rhode Island Avenue extended. There were formerly twenty houses, but it is said nine of those built have been sold or exchanged, and are not involved in the present proceedings, which it is said, is the culmination of dissatisfaction that has existed for a long time.

Organized Ten Years Ago.

The bill in equity was filed by Messrs. Charles H. Merillat and Mason N. Richardson, and Eugene Carusi, representing the shareholders named and some others. The bill sets forth that in the last months of 1892, and early in January 1893, the members of the syndicate or trust estate were solicited by Messrs. Thomas G. Hensey and Melville D. Hensey and Mellen C. Hooker to join with them in a syndicate they were organizing for the purchase of what was know as the Dean tract in Le Droit Park. A considerable number of those approached were friends and acquaintances of the organizers of the syndicate, and quite a number had been fellow clerks with the elder Hensey and with Mr. Hooker in the Treasury Department. The bill states that it was represented to those who were asked to join the syndicate that the land was to be bought from Mrs. Amanda Dean, its owner, and that the lowest price she would take for it was $150,000; that the ground was cheap at the price, and thought before the first payment of $50,000. had been made the land would be sold at a profit.

The bill further says that the syndicate was to be, and subsequently was, organized on a basis of $150,000. divided into one hundred shares, of $1,500. each of which $500.00 was to be paid in as soon as the syndicate was organized. It was represented to those solicited to take shares, the bill says, that the organizers of the syndicate each would take shares in the syndicate, and that those entering the syndicate would go into it on the basis of the first cost price of the land from Mrs. Dean, it being represented that the organizers needed financial aid in order to make the deal, which was of considerable size. The land, it was represented, was to be put in the name of Messrs. Thomas G. Hensey and Mellen C. Hooker, as trustees, and that they would manage it for the benefit of all concerned.

Price Paid for the Land.

The bill declares that the shareholders were got in the syndicate on that basis, advancing their money, some $50,000. on or prior to January 14th, 1893, and on January 16th, certificates were made out in the name of each shareholder for each share to which he had

subscribed. It is stated, as the land records of the District
54 show, that in January 14th Mrs. Amanda Dean, for a nominal consideration of $100. executed a deed to Melville D. Hensey for the land in question, located in block 12 of Le Droit Park, and that on January 16th Melville D. Hensey transferred the property by deed in trust to Thomas G. Hensey and Mellen C. Hooker, as trustees, subject to an incumbrance of $100,000., with power to "sell, mortgage, lease, or otherwise dispose of the property or any part thereof." The bill declares that the shareholders supposed that Melville Hensey merely took title as their agent, as a convenient means of transferring the property, and states that he is described on the back of the certificates given each shareholder as "Accountant to Trustees." It is declared that recently it has been accidently discovered that the price paid for the land was not $150,000., as represented to the shareholders, but that the price paid Mrs. Dean was, according to the best information the shareholders can obtain, between $112,000. and $120,000.; that at a recent meeting of shareholders the trustees were asked what price Melville Hensey had paid for the land and that they refused to state this or how long Mr. Hensey had any interest in the land prior to turning it over to the shareholders, and whether or not the trustees had the moneys of the shareholders in hand before the land was purchased and subsequently turned over to them at the advance price. It is stated also that Melville Hensey has been asked the price he paid and he has returned no answer.

Building of House Questioned.

The bill further states that, notwithstanding the only power given the trustees was to sell, mortgage, or lease, the trustees in 1899 undertook an extensive building project and borrowed some $60,000. of money, with which they proceeded to erect costly houses on Florida Avenue that outclassed the neighborhood in which they were erected, and that waste and mismanagement were shown in their construction. It is stated that the trustees claim to have erected the buildings by virtue of authority given them by a majority of the stockholders, but it is declared that a number of those interested in the syndicate had no notice of the intention to build until the buildings had begun and that others protested that it was a violation of their rights for the trustees to build when part of the shareholders, who were tenants in common, objected.

The trustees are called upon to exhibit the letters, or records of any meetings, when they received authority from a majority to build, and it is stated that the trustees said no minutes were kept of the meeting at which they allege authority was given to build. It is furthermore declared that the original proposition was to build houses to cost only $3,200.00, and that the trustees increased this limit to $5,200.00, the price each house cost. The bill further states that Thomas G. Hensey owned considerable other vacant ground in the vicinity of the houses built whose value would be increased thereby, and that as architect he employed his son, Melville Hensey, the same one hereinbefore mentioned, and that as builder one E. N.

Kellogg, who was interested, and that Kellogg did not fulfill the contract, but left town.

55 The bill further says that it has been ascertained that after Kellogg's failure, Mellen C. Hooker claims to have supervised construction of the building, and, contrary to his duty to the shareholders, charged a large commission therefor.

It is declared that itemized accounts never have ben rendered the shareholders, but that statements in bulk, from which nothing could be learned as to details, have been submitted. The bill prays for the removal of the trustees, the appointment of a temporary receiver, and discovery of the price paid Mrs. Dean for the land, and all commissions and fees charged by the defendants, an accounting from the defendants for the moneys due by them to the shareholders, and for the appointment of either two trustees or a permanent receiver to find up the affairs of the syndicate.

Mr. MERILLAT: That is all.

Mr. WOODARD: No questions.

PARK AGNEW.

Signed for the witness by me by consent and agreement of counsel, this 2nd day of October 1907.

EDWIN L. WILSON, *Examiner.*

MELVILLE D. HENSEY, produced as a witness for the complainants, and being duly sworn, testified as follows:

By Mr. MERILLAT:

Q. Please state, Mr. Hensey, your full name, age, residence and occupation?

A. Melville D. Hensey; Washington, D. C. I am an architect and member of the bar.

Q. You are the same Melville D. Hensey, are you not, who was a party plaintiff and likewise party complainant in the law and equity causes against the Mercantile Trust Company?

A. In what causes, sir?

Mr. WOODARD: The causes referred to.

Mr. MERILLAT: The causes referred to in the record here.

A. I am the plaintiff and complainant in the equity cause and the law cause against the Mercantile Trust Company.

Q. The law cause being a cause brought for the recovery of fifty thousand dollars as stated damages and in which a final judgment of some eight thousand and odd dollars was obtained, and the equity cause being a cause arising out of the construction of some houses on Washington Heights?

A. Yes, sir.

Q. What property did you have in 1902?

A. I could not answer that question now.

Q. Well, give it to the best of your recollection.

A. That is the best of my recollection.

Q. What property you had?

A. That is the best of my recollection.

Q. Do you mean by that you do not know what property you held in 1902?

A. I mean just exactly that; yes, sir.

Q. What property did you have in 1903 at the time of an
56 assignment by you which assignment has been placed in the record of your claim against the Mercantile Trust Company to Mertens and Agnew?

Mr. WOODARD: Objected to as being irrelevant and immaterial.

A. I refer to the record on that. I cannot remember those things; not by the year or in any such fashion as that, but if you will produce a piece of property and if the record shows I owned it, that is all right, but I cannot answer any such question as that.

Q. Did you have any property other than your interest in these Washington Heights houses, or your claim against the Mercantile Trust Company, at the time of this assignment to Mertens and Agnew?

Mr. WOODARD: Same objection.

A. I will have to refer you to the record. I do not recollect about it, one way or the other.

Q. By that you do not know whether you had any property at all or not?

A. I do not at this time remember.

Q. Now, was anything at any time paid by you on account of these several judgments obtained against you and which have been read in the record?

A. What several judgments do you refer to?

Mr. WOODARD: Same objection as before.

Q. (Continuing:) Being a judgment by Belt and Dyer.

Mr. WOODARD: We might as well have it understood now that my objection stands to all questions along this line of examination.

Mr. MERILLAT: We always conceded that, but you did not seem to want it that way.

Mr. WOODARD: You changed your testimony.

Mr. MERILLAT: We are entirely willing that Mr. Woodard shall be considered as objecting to the relevancy and immateriality of the testimony along the line of examination that we are now engaged in.

Mr. WOODARD: And also incompetency of the evidence.

Mr. MERILLAT: And also incompetency of the evidence along this line.

Q. (Continuing:) I refer to a judgment obtained against you by Belt and Dyer on or about March 3rd, 1903; another by the Raritan, Hollow Porous Brick Company on or about May 8th, 1900; George C. Pumphrey and George H. Palmer of date December 6th, 1900, and George C. Esher of date June 11th, 1900.

A. What was the last?

Q. That is the last—George C. Esher.

A. At what time do you mean were any payments made, since the judgments were obtained?

Q. Since the judgments were obtained?

A. That I could not say, whether there were any payments made.

Q. Do I understand there were no payments made on account of them?

A. I say I do not remember any. I would not say there was not any made.

57 Q. Please state whether or not the claims of any of these people arose out of the same matters, or the same construction of buildings as did the claims of Mertens and Agnew, the subject of your assignment?

A. No, sir; not all of them.

Q. Did any of them?

A. Some of them.

Q. Which?

A. You will have to furnish me a list in order to get that.

(Hereupon counsel handed witness a list of the judgments referred to.)

WITNESS: The Belt and Dyer judgment was on account of a fraudulently obtained endorsement by one Edgar C. Kellogg. He was borrowing some money from his brother-in-law, one Cranford, for use on some Dartmouth street houses, and obtained my endorsement on his note that he might get his money. It turned out that he already had the money and both he and Cranford obtained my endorsement on the note and Cranford then was to advance the money. That was not in this case. That judgment had nothing to do with the Mercantile Trust Company. The Raritan Hollow Brick Company judgment was for houses in the same block. That had nothing to do with that case. The George C. Pumphrey and Palmer case I think had something to do with the Washington Heights houses. The Esher judgment against Adam McCandlish was for money at Petworth—the stone work out at Petworth and had nothing to do with this case.

Q. Is it not a fact that the brick on account of which the claim against you of Mertens and Agnew arose was partly for brick furnished at Petworth and partly for brick furnished at Washington Heights under a contract which you had for brick for certain houses on Florida Avenue?

A. The brick for Florida Avenue and Petworth was paid for. It was under a yearly contract by which brick could be bought at any time during the year up to the limit of that contract unless the contract was exhausted during the year for certain prices. To that extent they were bought under the same contract.

Q. Was not the Washington Heights brick bought and obtained under that same contract?

A. They were obtained under the same yearly agreement at the same price without there were subsequent differences as to the contract affecting them. As for instance, the Florida Avenue brick were guaranteed by the trustees in the case. In the Petworth case Adam McCandlish guaranteed the brick, and in the Washington Heights

case Kellogg guaranteed them. The notes given in this case to Mertens and Agnew were given by Kellogg and endorsed by me.

Q. But they were all gotten, were they not, under one contract with the words "more or less"?

A. No, sir; I have just stated differently.

Q. What means had you at the time of your assignment to Mertens and Agnew of meeting the several claims against you?

A. That would be impossible for me to state.

Q. Did you, as a matter of fact, have any means of meeting
58 and paying off those claims against you?

A. I have already answered that question.

Q. I understand your answer to be, then, that you are unable to state any means that you had?

A. No, sir; I did not say that. I said it was impossible for me to state that I did have and I cannot state that I did not have.

Q. Can you state any means you had of meeting——

A. I have already said I do not recollect about it.

Q. (Continuing:) Can you recollect any means that you did have outside of your claim against the Mercantile Trust Company?

A. I have answered that I think.

Q. Why were the costs advanced by Mertens and Agnew for the suit?

A. Matter of agreement.

Q. Were you not unable at that time to advance them yourself?

A. No, sir; I would not say I was unable.

Q. Why was two hundred and fifty dollars paid you at the time of your assignment?

A. I do not recollect that the two hundred and fifty dollars was paid exactly at the time of the assignment.

Q. When was it paid you?

A. I could not state that, sir, exactly.

Q. Well, state as nearly as you can to the best of your recollection.

A. It was within a year, either way.

Q. It might have been a year before and it might have been a year after?

A. I don't think it was a year after. It might have been a year before—some of it. It was not all paid at one time.

Q. Why was it paid?

A. I could not say why it was. What do you mean, why was it paid?

Q. Upon what occasion?

A. What was the consideration?

Q. No, sir; what was said to you and what was said to them as the reason why this money was given you?

A. No more than under the agreement by which we started to sue the Mercantile Trust Company, or I started to sue to their use the Mercantile Trust Company.

Q. Was it given you because of your agreement to have the suit entered to their use?

A. That had some bearing on it, but whether that was identically the exact thing or not at this time I cannot remember.

Q. Was there any discussion between Mertens and Agnew of your affairs prior to the making of this assignment?

A. Yes, sir.

Q. Your affairs—your assets?

A. Do you mean my affairs outside of this suit?

Q. Yes, sir.

A. No, sir; I do not know of any discussion about that. We discussed this suit and my interest in the suit and their interest in it.

Q. In that discussion what agreement, if any, was there made as to what should be done if the suit should realize a large amount of money?

A. There was a great deal of talking pro and con and it was all centered in that agreement that is filed of record.

Q. What persons were there to whom you owed money outside of these judgment creditors and Mertens and Agnew, and as found by the court, the syndicate—the members of the syndicate known
59 as the Le Droit Park Syndicate?

A. At that time I did not owe them any money, sir. I do not owe them any money morally now.

Q. What moneys did you owe to any persons outside of these persons, namely, Mertens and Agnew and the judgment creditors who have been enumerated, and what the court has found to be due to the Le Droit Park Syndicate?

A. Samuel Ross and Thomas R. Riley.

Q. How much did you owe Ross?

A. I do not remember.

Q. How much Riley?

A. I do not know that. It is all a matter of record.

Q. Has either of them been paid?

A. Yes, sir.

Q. In full?

A. I understand so. They have released me.

Q. From what did they obtain their money?

A. Riley obtained a house number 1817 Kalorama Avenue in full of his bill and returned me Kellogg's note with my indorsement on it for all the money that I was responsible to him.

Q. How about Barbour and Ross?

A. I cannot remember, sir, exactly, but there was some kind of a settlement made during that case. It all happened prior to anything in this Mercantile Trust Company case. There has been so much minutia in this case it is impossible for me to remember them exactly. Samuel Ross never sued me for anything. Neither did Thomas R. Riley.

Q. Did you ever get any bill from Mertens and Agnew for this brick they furnished you?

A. I always got a bill. The bills came to Kellogg in the first place. The brick was sold to Kellogg with my guarantee.

Q. Do you know whether or not Kellogg got bills showing the amounts due?

A. Now, that is a little hard for me to say. As I recall that matter Mertens and Agnew every two or three weeks would send down a

tabulated list showing so many bricks furnished, indicating the cart loads, whether the cart held eight hundred or six hundred and whether it was a double cart. With that was a signed ticket of the foreman on the job and Kellogg would take this list and add it up and see whether it was right or not, and he would give Mr. Mertens a check for whatever money he could and then give him a note, generally for three months, for the balance. My endorsement went on that note and that is how I came to be responsible.

Q. After your notes were not paid did Mertens and Agnew, or any one for them, recall the fact of the non-payment to your attention?

A. Yes, sir.

Q. Did they ask you what you proposed to do about it?

A. Asked me what I could do about it.

Q. Did you state to them what you could do about it?

A. Those notes were curtailed. Some of the original notes in the case were curtailed. It was after Kellogg decamped that the notes were not taken up.

Q. When was it he decamped?

A. November 21st, 1899. At least, that is the last day I saw him.

Q. From December, 1899, did Mertens or Agnew, or any one for them, ever recall the fact of the non-payment of these notes to your attention?

A. Certainly.

Q. What did they ask you as to the non-payment of the notes?

60 A. I could not tell you that. They asked the usual business questions: "Why don't you pay your notes?"

Q. Did they inquire into what means you had?

A. I do not recall that they did because about that time it was agreed to pool all of Kellogg's valuable property and it was bought in at auction in my name and a new loan made on it and we expected that the property would pay out, but by the falling down of one Jones, for whom the Mercantile Trust Company was surety, the property was renewed and finally sold out under the trust.

Q. Nothing was realized for the persons who were creditors of yourself from the sale?

A. Excepting in the case of Riley and something in the case of Ross. I do not know who the other creditors are you are mentioning. I do not know. In fact all the creditors I had started suit. Esher was one of those creditors who started suit.

Q. Was the fact of these suits and judgments that have been obtained against you ever a matter of discussion between yourself and Mertens and Agnew in any way including Mr. Woodard?

A. Not to my knowledge.

Q. Did you and Mr. Woodard ever have any talk of the existence of the judgments against you?

A. I cannot say I did; no, sir.

Q. Can you say you did not?

A. That is my impression that we did not.

Q. Who was your attorney at this time, if you had one?

A. Well, I do not know as I had one.

Q. Did you have any one acting for you in the capacity of attorney?

A. Do you mean in the Mercantile Trust Company case?

Q. Prior to the institution of that suit.

A. You will have to be identical. What suit are you talking about?

Q. The Mercantile Trust Company.

A. Which one?

Q. The law suit.

A. The suit for damages on the bond is the one you refer to?

Q. Yes, sir.

A. Messrs. Birney and Woodard were the only lawyers I had in that case. I was taken to them by Mr. Mertens. It was the result of a conference between Fred. Mertens and myself.

Q. As a result of your talk and conference with Mr. Frederick Mertens he took you to Messrs. Birney and Woodard who subsequently represented you?

A. After a further conversation. At that time they did not represent me. That first conversation with Messrs. Birney and Woodard was had at the time the property was bought in at auction from Kellogg and it was the falling down of the Mercantile Trust Company, bondor, or the alleged principal under the bond—the Mercantile Trust Company and Jones.

Q. Were you and Kellogg building together under the same agreement or arrangement between the two of you?

A. That is a matter of record. If you want to look it up you will find it. I was not his partner. He was not my partner if that is what you are driving at.

Q. Did you have a joint bank account?

A. We had a joint bank account at the Riggs and Columbia, but the account was opened at the direction of the people making the loan for the purpose of making the check or holding a check over Kellogg's money.

61 Q. Mr. Hensey, have you any property at this time?

A. I have not, sir; outside of the personal property which you see on my back.

Q. Now, when did you make the transfer, if you recall, of your last piece of property?

Mr. WOODARD: Objected to.

A. I do not remember.

Mr. WOODARD: No cross-examination.

MELVILLE D. HENSEY.

Signed for the witness by me by consent and agreement of counsel, this 2nd day of October 1907.

EDWIN L. WILSON, *Examiner.*

Hereupon the further taking of testimony in this cause and on this behalf was adjourned subject to agreement of counsel or notice.

EDWIN L. WILSON, *Examiner.*

WASHINGTON, D. C., *May 28th*, 1907—at 3 o'clock p. m.

Met pursuant to agreement of counsel at the same place for the purpose of taking additional testimony on behalf of the complainants.

Present: Mason N. Richardson, Esq., for the complainants; Henry F. Woodard, Esq., for the defendants; Examiner and witness.

BATES WARREN, produced as a witness for the complainants, and being duly sworn, testified as follows:

By Mr. RICHARDSON:

Q. Mr. Warren, will you please state your name and occupation?
A. Bates Warren; attorney at law.
Q. I call your attention to a proceeding in equity in the Supreme Court of the District of Columbia, being Equity cause number 22,483, filed by Melville D. Hensey and Frederick Mertens and Park Agnew, trading as Mertens and Agnew, against The Mercantile Trust Company, a corporation, Percy H. Russell and Hayden Johnson, trustees, and to the third paragraph of the bill in which it is stated, among other things, that certain properties or lots on Washington Heights were acquired by yourself as trustee for certain creditors, and I will ask you to state what, if anything, was realized for the creditors from a sale of that property?
A. Nothing to my knowledge.
Q. What became of the equity which you thus held as trustee in the interest of the creditors?
A. The property that was deeded to me was subject to several trusts and under one of those trusts there was a foreclosure sale and no money came into my hands from the property.

By Mr. WOODARD:

Q. There was no balance over?
A. No, sir; no balance over.

62 By Mr. RICHARDSON:

Q. When about was that foreclosure sale, if you can state?
A. I could not say.
Q. Can you give any idea as to the time?
A. I could look it up and get it if you want me to, but I could not recall that.

It was hereupon agreed between counsel that Mr. Richardson could ask the question and the witness supply the answer after looking the matter up. The following question was thereupon asked by counsel.

Q. Will you please state the date when that foreclosure proceeding took place.
A. The sale took place the 27th day of July, 1901.
Q. Mr. Warren, will you state who some of the creditors were, if you know, referred to by that agreement?

By Mr. WOODARD:

Q. Is it not a fact, Mr. Warren, that the agreements were all in writing?

A. The agreement that Mr. Richardson refers to is in writing.

Mr. WOODARD: I object to any statements made outside of the written record—the written contracts or agreements.

Mr. RICHARDSON: I asked as a matter of fact if Mr. Warren knows who some of the creditors were.

Mr. WOODARD: I object to any statement made by this witness as to who the creditors were if the agreement contains the names of them.

A. My impression is, Mr. Richardson, when I took the property in I gave a declaration of trust or signed a declaration of trust stating in detail how the proceeds from that property, if I ever got any, were to be disbursed and my recollection goes farther—my recollection is further that there were certain creditors of Melville Hensey that I was to make distribution to provided they signed an agreement or something to that effect, and I do not remember whether any of those creditors ever signed that agreement or not. I remember in a general way that there were creditors of Melville Hensey at that time, among whom were Mertens and Agnew, and I believe Mr. Ross and Mr. Riley.

Q. Will you tell their first names?

A. Samuel Ross and Thomas R. Riley. I do not know the first names of Mertens and Agnew—Park Agnew and Frederick Mertens I believe.

Q. Have you a copy of that declaration of trust or the original?

A. I looked for those at my office the other day, but I was unable to find them at that time.

Q. Will you state whether or not Mr. Ross or Mr. Riley were settled with in any way as creditors of Melville Hensey on account of the indebtedness growing out of the construction of the Washington Heights houses?

A. Not to my knowledge. Not to my knowledge have they been paid anything.

Q. As a matter of fact they were not paid anything?

A. Not out of the proceeds of that property they were not.

63 Q. As I understand, nothing was realized for the creditors out of that property?

A. Out of that property?

Q. Yes, sir.

A. No, sir.

Cross-examination.

By Mr. WOODARD:

Q. Mr. Warren, you have no information as to whether or not a settlement was ever made with Thomas R. Riley by Hensey?

A. No, sir.

Q. Is it not a fact that he received a house out of the twenty-one houses which settled his account?

A. I do not know whether that settled his account in fact or not. I know he received one. I do not really remember.

Q. You do not know anything about that?

A. I do not remember the particulars of it. I might have known at the time, Mr. Woodard, but I do not recall the particulars of it now.

Q. So at this time you would not be able to say whether Mr. Hensey owes Mr. Riley anything or not?

A. No, sir.

Q. And that is approximately so with Mr. Samuel Ross, trading as Barbour and Ross?

A. I do not know of any settlement he had with me. I would not undertake to say. In fact I do not know.

Q. Is it not a fact that Mr. Hensey turned over to Mr. Ross in settlement of that account a large number of mantels?

A. I do not think he did, Mr. Woodard.

Q. You do not know anything about that?

A. Yes, sir; I remember there was some suit filed against Mr. Hensey in respect of some mant*les* in some way. I think Mr. Ross attached some mant*les* in Mr. Hensey's possession about which they had litigation and Mr. Ross finally won out in that litigation and got those mant*les*, but how much was credited up on the indebtedness of Mr. Hensey to Mr. Ross I do not know. I know he certainly got hold of some mant*les*.

Q. You are the attorney for Mr. Ross, are you not?

A. Yes, sir.

Q. Have you ever brought any suit against Mr. Hensey for Mr. Ross for any indebtedness contracted back in 1900 and 1901?

A. I have not other than in reference to that mant*le* suit.

Redirect examination.

By Mr. RICHARDSON:

Q. You may state where that mant*le* suit was commenced, whether in the Supreme Court of the District of Columbia or before a justice of the peace?

A. It commenced before a justice of the peace.

Q. Do you know before what justice of the peace?

A. It was before Justice Mills. Did not Justice Mills have his office around here on this corner? (indicating).

Q. Do you know whether or not that suit was filed subsequently in the Supreme Court?

A. Yes, sir; it was appealed and tried before Judge Cole.

Mr. WOODARD: Please note there that pursuant to an agreement heretofore made between counsel that my objection hereto-
64 fore made for irrelevancy and immateriality should stand good. I will move to strike out all of the testimony of Mr. Warren because the same is immaterial and irrelevant to the issues in this case.

BATES WARREN

Signed for the witness by me by consent and agreement of counsel, this 2nd day of October, 1907.

EDWIN L. WILSON, *Examiner.*

Mr. RICHARDSON: Counsel for the complainants offer in evidence specifically the assignment of the cause of action to Mertens and Agnew filed of record November 3rd, 1903, in the law suit number 44,822.

Counsel for complainants also offer in evidence a certified copy of a deed from Melville D. Hensey, and wife, to Bates Warren, recorded in liber 2460, folio 346, of the land records of the District of Columbia, dated the 24th day of January, 1900. Said certified copy is filed herewith and marked complainants' Exhibit D.

It is stipulated that Exhibits B and C attached hereto are true and examined copies of the original records in respect of which they purport to be copies, and that the originals thereof will be produced at the hearing of this cause.

Hereupon counsel for complainants announce their case closed.

Hereupon counsel for the defendants announce their case closed.

COMPLAINANTS' EXHIBIT A.

Bill for Injunction.

Filed July 23, 1901.

In the Supreme Court of the District of Columbia.

Equity. No. 22483.

MELVILLE D. HENSEY, FREDERICK MERTENS, and PARK AGNEW, Trading as Mertens & Agnew, Complainants,

vs.

THE MERCANTILE TRUST COMPANY, a Corporation; PERCY H. RUSSELL and Hayden Johnson, Trustees; Brainard H. Warner, Clarence B. Rheem, Samuel Ross, Thomas R. Riley, and Bates Warren, Defendants.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

I, Melville D. Hensey, being first duly sworn, on oath depose and say that I have read the foregoing bill by me subscribed and know the contents thereof; that the matters and things therein
65 stated of my own knowledge are true and those stated on information and belief I believe to be true.

MELVILLE D. HENSEY.

Subscribed and sworn to before me this 23rd day of July, 1901.

[SEAL.] HERBERT L. FRANC,
Notary Public, D. C.

* * * * * * *

COMPLAINANTS' EXHIBIT B.

Bill.

Filed July 18, 1903.

In the Supreme Court of the District of Columbia, Sitting in Equity.

Eq. No. 24084, Doc. 54.

CHARLES W. RICHARDSON, JOSEPH W. LITTLE, MARY B. CUMMINGS, W. A. Bevard, F. H. Chittenden, Frances E. Grice, B. Richards, Geo. C. Esher, Mary A. Heinz, Alice Titcomb, William B. Brittain, Pauline Heinz, James T. Brown, Gertrude L. Chittenden, Etta Beatty, Bernard E. Fernow, Joseph W. Noble, Elizabeth Olmstead, Leah Tallmadge, Complainants,

vs.

THOMAS G. HENSEY, MELLEN C. HOOKER, MELVILLE D. HENSEY, Defendants.

Your complainants respectfully state as follows:

1. That they are citizens of the United States and residents of the District of Columbia, and bring this action in behalf of themselves and all the other members of the syndicate herein referred to similarly situated as beneficiaries under the syndicate agreement and deed of trust hereafter described and set out, the other parties to said syndicate agreement and deed of trust too numerous to mention and many of them being widely scattered outside of the jurisdiction of this Court, so that it would be impracticable and would cause vexations, delays and injustice to join all persons as parties, complainant or defendant who like complainant- are beneficiaries under the syndicate agreement and deed in trust hereinafter mentioned and whose interests are identical with those of your complainants.

2. That the defendants are citizens of the United States and residents of the District of Columbia, and that the defendants Thomas G. Hensey and Mellen C. Hooker are sued in their own right and as trustees under the hereinafter described deed in trust; that Melville D. Hensey is sued in his own right and as agent of the
66 trustees aforesaid and of your complainants and as a beneficiary under the hereinafter described deed in trust and syndicate agreement.

3. That prior to the 14th day of January, A. D., 1903, the defendants Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, each in what he did acting in conjunction with and for and on behalf of the other two defendants, solicited or induced your complainants and the other members of the syndicate hereinafter mentioned to join them, the said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, in a syndicate for the purchase of the Dean tract of land in Block 12, of Le Droit Park. They

stated to your complainants that they had an opportunity to purchase the aforesaid land at a cheap price that would certainly net a profit in a very short time, but that they, themselves, had not sufficient money available with which to purchase the aforesaid tract of land which would cost $150,000 from its then owner, (naming as complainants are informed and believe to some of the prospective shareholders Mrs. Amanda Dean, as the owner) and they said that for this reason they desired to form a syndicate and to interest your complainants and others in its purchase on equal terms with themselves, the organizers of the syndicate, stating that they, the said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey each would take shares in the proposed syndicate and said property when acquired would be taken and held in the names of said Thomas G. Hensey and Mellen C. Hooker, in trust for the use of the persons who furnished the purchase money of said real estate, and that the trustees would handle and dispose of the land as trustees for all the shareholders in the syndicate to the best interest of all concerned and that the proceeds derived from sales of the land to be acquired would be divided among the persons interested therein proportionately to the investments in the syndicate. That said defendants Hensey, Hooker and Hensey represented to your complainants and they so understood that the cost of the land from the owner, Mrs. Amanda Dean, and the lowest price that the same could be purchased for was $150,000 of which $50,000 would have to be paid in cash and the balance in notes. That the syndicate would be organized on a basis of $150,000 divided into 100 shares of $1,500 each, representing the lowest price for which the land could be obtained as your complainants were led to believe by said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey; that they treated the defendants as their agents in the purchase of the property; that such relation as principal and agent was understood to exist, and your complainants aver and charge did exist between your complainants and the organizers of the syndicate to whom the complainants turned over their moneys; that complainants then having faith and confidence in the defendants as their agents and trustees did not investigate their statements but entered into the syndicate in the belief that the representations made them were true and did not discover to the contrary until recently. That defendants represented that the price named was a low one, that the land would rapidly increase in value by reason of certain events which would occur in a short time; that
67 it never would be necessary to make further payments on account of said purchase; that as soon as sufficient number of shares were agreed to be taken to assure formation of the syndicate and a first payment of $500 per share was made by each of the subscribers to the syndicate, they, the aforesaid Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, which last named person your complainants were led and induced to believe was an agent for the proposed trustees and for the shareholders and who disclosed himself as "accountant for trustees" in the declaration of trust hereinafter referred to would purchase the land from its owner and

thereafter would assign shares to each subscriber to the syndicate in proportion to his shareholdings; that it was stated by the defendants aforesaid to your complainants and others who became subscribers to the syndicate that by said subscription they would get in on the "ground floor" that is to say would acquire the aforesaid Dean tract which they, the syndicate organizers, had an opportunity of purchasing at the first cost price and would share equally with the managers of the syndicate in the profits that all would realize from the deal, into which, as stated, it was represented and your complainants were induced to believe all would go on equal terms. That your complainants have learned only recently that said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey studiously concealed from your complainants that they or any one of them had purchased or intended to purchase the aforesaid land, or had an option thereon or had the refusal of the same at a price much less than the total price named to your complainants and that there was any purpose on his or their part to purchase the land from its owner, Mrs. Amanda Dean, for his or their individual benefit. Your complainants on the contrary had it represented to them, and they understood and believed that they would acquire said land at the lowest price which the owner aforesaid would accept for the same, that is, for the price of $150,000. That your complainants would not have invested their money in said syndicate had they known, as they have learned only recently, the real facts, that the price had been misrepresented and that they were paying many thousand dollars more than Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey or either of them had paid or were to pay for the said land to its owner, Mrs. Amanda Dean. But, that relying upon the representations of said defendants, Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey that the land was being bought from the owner for $150,000 and was a low price and at that time having faith and confidence in the integrity, honesty and fair dealing and knowledge of real estate values of the defendants, Hensey, Hensey and Hooker, your complainants agreed to become and on perfection of the organization of the syndicate did become members of the trust estate or syndicate they the aforesaid defendants were organizing and did organize your complainants each bound himself to take certain numbers of shares and to pay the price agreed on for each share in and as the same should be demanded of him. That your complainants have since and
68 very recently learned that the statements made to them by the defendants aforesaid, Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, as to the price of the land aforesaid from the owner, namely, $150,000 were false and that your complainants by means detailed at length hereafter had been defrauded out of the difference between this price and the price actually paid the owner, Mrs. Dean, namely, between $112,000 and $120,000, besides out of certain moneys in connection with erection of buildings, on the said land referred to hereinafter.

4. That thereafter your complainants some time in the early part of January, 1893, to the best of your complainants' knowledge,

recollection and belief, received information from the defendants, the aforesaid Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, that they had succeeded in getting a sufficient number of subscribers to form said syndicate and that your complainants by the terms of their agreement should deposit with them, the said defendants, the amounts your complainants had agreed to contribute as a first payment in and for the purchase of the land to be bought, that is to say, $500 for each and every share subscribed. That your complainants thereupon gave to the defendants moneys to the amount they severally had agreed to pay in on account of their shares, that is, $500 for each and every share your complainants subscribed for. Some of your complainants made their payments to the aforesaid defendants prior to the 14th day of January, 1893. Your complainants are informed and believe and therefore aver that the books of the syndicate show that the entire one hundred shares into which the syndicate capitalization was divided was subscribed for and taken and the $50,000 represented as necessary to be paid as a first payment for and on account of the purchase of the tract of land to be bought by the syndicate was actually paid in, through Melville Hensey, Thomas G. Hensey and Mellen C. Hooker, to the syndicate trustees on January 14, 1893, the date when, as the records of the District of Columbia show, there was executed a deed conveying the Dean tract of land therein referred to to Melville D. Hensey.

5. That thereafter, on the 16th day of January, 1893, there was executed by and between each of your complainants and the other shareholders in said syndicate and the trustees a written agreement styled a "Declaration of Trust" setting out the terms and conditions on which the several parties to the syndicate held their interests in said syndicate. A true copy of said "Declaration of Trust" is attached hereto marked Exhibit — and is prayed to be read as a part hereof, the same being identical with those held by all the shareholders save as to names of beneficiaries and number of each certificate. By said "Declaration of Trust" it was declared that Thomas G. Hensey and Mellen C. Hooker, trustees, with power to sell or mortgage, hold in trust under a certain deed from Melville D. Hensey dated January 16, 1893, lots 14, 15 and 16 in block 12 of A. L. Barber and Company's subdivision of Le Droit Park and also lots 19, 20, 21, 22, 23, and 24 in Amanda M. Dean's subdivision of lots in block 12 of Le Droit Park subject to certain trusts to secure payment of $100,000 on said land, and that
69 said Thomas G. Hensey and Mellen C. Hooker were trustees for an undivided one-one-hundredth interest held as tenants in common by each owner of one share in the "Declaration of Trust," but subject to payments of assessments on each shareholder as they might be called on to pay assessments. And your complainants aver that they have paid all lawful assessments in and as the same have become due and payable under the terms of said declaration of trust and were and still are members of said syndicate with all the rights thereunto appertaining.

6. That, as stated in the "Declaration of Trust" hereinbefore re-

ferred to, the title to the land owned by said syndicate was conveyed to Thomas G. Hensey and Mellen C. Hooker under a certain deed in trust from Melville D. Hensey, which said deed in trust is attached hereto marked A-2 and is prayed to be read as a part hereof. That in and by said deed in trust there is conveyed by Melville D. Hensey for the sum of $100 to Thomas G. Hensey and Mellen C. Hooker as trustees the land purchased for the aforementioned syndicate, the same being situated in the County of Washington, District of Columbia, described as follows:

All of lots Fourteen (14), Fifteen (15) and Sixteen (16), in Block numbered Twelve (12), in A. L. Barber and Company's subdivision of certain tracts of land, now known as "Le Droit Park," as per plat recorded in Liber Governor Shepherd, folio 15, of the records of the office of the Surveyor of the District of Columbia. Also all of lots numbered Nineteen (19), Twenty (20), Twenty-one (21), Twenty-two (22), Twenty-three (23) and Twenty-four (24), in Amanda M. Dean's subdivision of lots in said Block Twelve (12) "Le Droit Park" as per plat recorded in Liber County No. 8, folio 35, of the records aforesaid, and the same being conveyed to said Thomas G. Hensey and Mellen C. Hooker as trustees subject to payment of two certain deeds of trust aggregating $100,000 with "full power to sell, mortgage, lease or otherwise dispose of the same or any part thereof." That all of said deeds, including the aforesaid deed in trust and a deed in fee from Amanda M. Dean to Melville D. Hensey, which is attached hereto marked Exhibit A-3 and prayed to be read as a part hereof at on and the same time, on January 19, 1893, in the office of the Recorder of Deeds for the District of Columbia and your complainants then and from that time until very recently had supposed that Melville D. Hensey in all transactions to formation of the syndicate and in executing both said deeds was acting as agent for the trustees and for all the syndicate shareholders.

7. Your complainants are informed and believe and therefore aver and charge that by the misrepresentations, concealments artifices aforesaid a fraud was perpetrated on your complainants and by such fraud they were induced by defendants to advance to defendants, their agents, the moneys of your complainants for the purchase of the aforesaid land, which aforesaid land thereupon was turned over to your complainants at an advanced price and at a large wrongful profit, namely, the difference between $112,000 or $120,000, the price for which Melville D. Hensey acquired title to the aforesiad land from its owner, Mrs. Amanda Dean, and $150,000, to the organizers of the syndicate and trustees for your complainants.

That the means whereby said fraud was perpetrated and consummated was as follows: Thomas G. Hensey and Company, is a firm of real estate brokers in this city, of which said firm Thomas G. Hensey was and is the senior partner and of which said firm as your complainants are informed and believe Melville D. Hensey, then a young man 23 or 24 years of age and without independent means so far as your complainants have been able

to learn, was an employee or clerk, and in which firm your complainants are informed and believe and therefore aver said Melville D. Hensey became a partner. Mellen C. Hooker is a real estate broker in the City of Washington. Some time in 1892 as your complainants are informed and believe and therefore aver the persons above named learned the price at which the land hereinbefore mentioned could be purchased, namely, the price at which Melville D. Hensey did subsequently acquire title to the aforesaid land between $112,000 and $120,000. They thereupon undertook to form a syndicate for its purchase and the three defendants named, the Messrs. Henseys and Hooker, proceeded in divers ways to interest their friends and acquaintances and persons who had confidence In them in its purchase, soliciting them to become members of the syndicate they proposed to form, stating to them that they, meaning the organizers of the syndicate, could buy the land from its owners for $150,000, that they would act for and in behalf of those who aided them to effect the purchase, that the land was cheap at this price, that they themselves would take a certain number of shares in the syndicate, and would take the other subscribers to the syndicate in on the same terms with themselves, and would manage the property for the best interests of all persons interested in the syndicate as their trustees. Melville D. Hensey in all these transactions acted as a person interested in the formation of said syndicate and as one of the agents in the organization of the syndicate and as agent for all parties concerned, and was treated as their agent by persons whom he interested in the syndicate, and in the syndicate agreement was designatued "Accountant for Trustees."

All during the negotiations for and the actual organization of the syndicate, and since its organization, until your complainants recently discovered to the contrary, there was carefully and studiously concealed from your complainants the fact that Melville D. Hensey or the trustees had or would have any interests adverse to your complainants, that the real price to be paid the owner for the land was, as your complainants are informed and believe and therefore aver $120,000 or less, and that by means of interesting your complainants in the syndicate the defendants, trustees and organizers of the syndicate would make a large profit out of your complainants and either would obtain interests in said syndicate for nothing or would obtain for no consideration and by duping your complainants moneys from them wherewith and whereby to acquire interests in the syndicate. Your complainants have made
71 repeated efforts to learn from Messrs. Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, the defendants, and from Joseph Paul, the agent of Mrs. Amanda Dean, the price paid the said Mrs. Dean, for the land aforesaid, but they have neglected and the two first named at a meeting of all local shareholders refused, to give your complainants any information on the subject though admitting a lesser price than $150,000 was paid Mrs. Dean and it was only by chance complainants were able to learn what they believe was approximately the price paid. Having succeeded in effecting organization of the syndicate and having the moneys of

your complainants in hand, the defendants, organizers of the syndicate, purchased said land, title being taken in the name of Melville D. Hensey and two days later by collusion among the defendants Messrs. Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, conveyed said land at the advanced price of $150,000 to Thomas G. Hensey and Mellen C. Hooker as trustees for your complainants and the syndicate. Your complainants charge that in this transaction Melville D. Hensey was merely the agent or tool of the trustees Messrs. Thomas G. Hensey and Mellen C. Hooker. Your complainants on information and belief aver that by the aforesaid misrepresentation, fraud and artifice a large profit was unlawfully made by the defendant organizers of the syndicate, and trustees for the syndicate out of the other members of the syndicate, that the moneys subscribed by the syndicate shareholders, other than Thomas G. Hensey, Melville D. Hensey and Mellen C. Hooker, was the means directly or indirectly wherewith the said land was bought, that the shares of Thomas G. Hensey and Mellen C. Hooker in said syndicate do not represent value of money actually contributed to said syndicate or any consideration whatever but directly or indirectly represent part of the illegal profit they made out of said syndicate shareholders by the aforesaid misrepresentations, fraud and artifices, that in all that they did during, at the time of and since organization of the syndicate Messrs. Thomas G. Hensey, Melville D. Hensey and Mellen C. Hooker were, as your complainants are advised and believe, and therefore aver, trustees *fo* your complainants and should be so declared by the court and decreed to hold the shares standing in their name- as trustees for your complainants and to reimburse them for any losses your complainants may be found to have illegally suffered. Your complainants on information and belief aver that Thomas G. Hensey has eight shares in said syndicate that two shares have been given by him to a relative; that Mellen C. Hooker has fourteen shares in said syndicate, all intact and that Melville D. Hensey has one share in said syndicate and possibly interests in other shares.

8. That said Thomas G. Hensey and Mellen C. Hooker, trustees under said deed in trust hereinbefore referred to on or about the nineteenth day of January, A. D. 1894, subdivided part of lots numbered nineteen (19), Twenty (20), and Twenty-four (24) and all of lots numbered Twenty-one (21), Twenty-two (22) and Twenty-three (23) of Amanda M. Dean's subdivision, in said Block Twelve (12), above set forth, into lots numbered Twenty-five (25)
72 to Forty-five (45) inclusive, as per plat recorded in Liber County No. 9, folio 86, of the records of the office of the Surveyor for the District of Columbia. That on or about the first day of March, A. D. 1899, said Hensey and Hooker, trustees as aforesaid, resubdivided said lots twenty-five (25) to Forty-five (45) inclusive, in said Block Twelve (12), into lots numbered Forty-six (46) to Sixty-five (65) inclusive, as per plat recorded in Liber County No. 12, folio 33, of the records aforesaid; the same being known as Thomas G. Hensey and Mellen C. Hooker, Trustees, subdivision of lots in said Block Twelve (12).

9. That thereafter certain condemnation proceedings were instituted on behalf of the District of Columbia for the extension of Rhode Island Avenue, through "Le Droit Park" and part of said lot numbered Twenty-four (24) of Amanda M. Dean's subdivision of lots in said Block Twelve (12) was condemned and approximately 20,759.90 feet of ground in said lot was appropriated to the use of said avenue, the District allowing compensation therefor in about the sum of $20,760, as per plat recorded in Condemnation Liber No. 15, folio 5, of the records of the Surveyor's Office aforesaid. That under said condemnation proceedings certain benefits were assessed against said land aggregating as your complainants are informed and believe between ten and eleven thousand dollars.

10. That said syndicate by the terms of the aforesaid deed in trust and syndicate declaration obtained the land in fee simple subject to certain trusts or mortgages aggregating $100,000, a part of which since then has been paid off, each shareholder becoming a tenant in common of the said land to an extent or degree proportionate to his contribution to the total syndicate's price, that is to say your complainant Charles W. Richardson having a five-one-hundredths therein by reason of payments of over $1,400 per share on five shares, your complainant Joseph W. Little a three-and-a-half-one-hundredth interest therein by reason of similar payments; your complainant Mary B. Cummings a one-hundredth interest therein by reason of similar payments; your complainant B. Richards a one-one-hundredth interest therein by reason of similar payments; your complainant Mary A. Heinz a three-one-hundredths interest therein by reason of similar payments; your complainant George E. Esher a two-one-hundredths interest therein by reason of similar payments; your complainant Francis E. Grice a one-one-hundredth interest therein by reason of similar payments; your complainant F. H. Chittenden a one-one-hundredth interest therein by reason of similar payments therein by himself and C. L. Marlatt, your complainant Chittenden being an assignee of one-half of a one-one-hundredth interest from said Marlatt; your complainant W. A. Bevard a one-half of one-one-hundredth interest therein by reason of similar payments; your complainant Alice Titcomb a two-one-hundredths interest therein by reason of similar payments; your complainant William B. Brittain a one-one-hundredth interest therein by reason of similar payments; your complainant Pauline Heinz a two-one-hun-
73 dreth interest therein by reason of similar payments; your complainant Bernard E. Fernow a five-one-hundredths interest therein by reason of similar payments; your complainant James T. Brown a one-and-one-half-hundredths interest therein by reason of similar payments; your complainant Etta Beatty a one-one-hundredth interest therein by reason of similar payments; your complainant Gertrude L. Chittenden a one-one-hundredth interest therein by reason of similar payments; the title to said land, however, being vested in the organizers of the syndicate, Messrs. Thomas G. Hensey and Mellen C. Hooker in and upon certain trusts and powers, namely, as trustees for your complainants with "power to sell, mortgage, lease or otherwise dispose of" the said land, but with

no power to use or exploit the land for any other purpose and with no power to bind the land or your complainants' interest therein in any other manner or for any other purposes than those stated in the grant of the specific powers enumerated. That in certain ways and by certain means, including exchanges of the houses hereinafter mentioned, for shares of stock there have been turned in to the syndicate some eleven shares of stock, making 89 shares instead of 100 among which the assets of the syndicate now should be divided.

11. That after said syndicate had been in operation some years the trustees without authority in and under the deed in trust by which they held title to the land aforesaid, without permission or authority from a larger number of the shareholders in said syndicate, without the knowledge of some of them and against the protests of other shareholders proceeded upon a large, extensive, costly and extravagant project of improvement of a large part of the said land by the erection of buildings thereon. That to carry on this building project the trustees in the claimed exercise of their powers and notwithstanding the purpose of the loan was in violation of their trust proceeded to incumber the land with a large and heavy building loan, namely, a loan of $60,000 and then proceeded to erect a class of buildings on part of said land that were extravagantly designed and far more costly than the locality justified. Furthermore, in the construction of said houses extravagance and waste was shown and due and proper business care and judgment was not exercised. That the first a number of your complainants knew of the erection of the houses was when they saw in the newspapers that their erection had begun and others of your complainants were in no position to begin costly litigation and were informed by the trustees aforesaid that the trustees had power under the agreement to act as they deemed best. That your complainants since have learned that Thomas G. Hensey was largely interest- in vacant lands in the immediate neighborhood of the syndicate property as the records of the District will show and complainants believe and therefore aver that one reason why said improvements were projected was, at your complainants' expense, to enhance the value of other vacant land in which said Hensey was interested That the trustees began the building of 20 houses costing more than $5,200 each to build though the original plan was to limit the cost to $3,000 each as represented to some shareholders by letters. That they employed as architect
74 the Melville D. Hensey defendant herein, a young man and so far as complainants are informed without experience or skill, and let the building of them to an irresponsible party, one A. N. Kellogg, who was mixed up with said Melville D. Hensey in a number of schemes and projects and before the buildings mentioned herein were finished defaulted and fled the city. That no bond, or if so no adequate and sufficient bond, as it is customary and as it was the duty of the trustees to do, was taken from said Kellogg by the trustees for the construction of said buildings. If any bond was taken, no suit on the same ever has been entered as was the duty of said trustees and the trustees though requested to furnish and given ample time to furnish said bond to your complainants have neglected

so to do. That after the default of said Kellogg the said dwellings were completed at the expense of your complainants and other members of the syndicate. The defendant Mellen C. Hooker claims to have supervised completion of said buildings and as your complainants are informed and believe charged and was paid large commissions, namely, a commission of 6% for his services though the same was in violation of his trust as complainants are advised. Your complainants have been informed and believe that large commissions also have been paid said Melville D. Hensey and said Thomas G. Hensey for alleged services in connection with the property of the syndicate, but no detailed, adequate statement of account ever has been rendered your complainants by said trustees, showing just what moneys were paid out, to whom and on what account though your complainants have requested such detailed explanations. That your complainants' attorney Charles H. Merillat, at a meeting with the trustees requested to see the construction account, and the book showing the items of cost of the buildings erected, but though the dwellings were built three years ago, the book was not produced and he was informed by the trustees that the building or construction book had not been posted up and that it would not be intelligible to any one but the trustees, that they had approximated the cost from what data they had, vouchers, etc., but that if given until the next semi-annual meeting (about next December) the trustees would fix up a detailed statement and when he then demanded to see the letters sent and received and records of the meeting when it was alleged authority was given to build he was met with the evasive replies, the statement that it was Summertime and that it would take some considerable time to hunt them up and produce them. That the aforesaid buildings have been for sale for some months at Seven thousand dollars each, which price the aforesaid Thomas G. Hensey has admitted would represent no more than the alleged cost price of the buildings and ground to the shareholders and no profits or interest on their money, but the extravagance and waste in the construction of the buildings was such that none of them have been sold as your complainants are informed and believe for as much as the alleged cost price "seven thousand dollars) notwithstanding improved realty now by reason of the largely advanced cost of building material and labor is at least 25 per cent higher than when said houses were built. That your complainants are informed
75 and believe that some of the houses have been traded and exchanged and perhaps have been figured in such deals at seven thousand dollars but the same was a fictitious and not a cash price and some of the houses so exchanged have been sold by the persons taking them for six thousand dollars. That notwithstanding the houses are not over three years old your complainants are informed repairs have had to be made on them. That the houses not sold rent for only $35.50 per month, and as complainants believe not over three per cent. per annum of the money invested in them after taxes, commissions, repairs and other expenses are provided for, whereas the loan with the proceeds of which they were built bears interest at six per cent. per annum so that the houses have been a drain on the

syndicate and recently assessments have had to be paid to meet the interest charges, expenses and commissions laid against the same by the defendant trustees.

12. That since the purchase of the land aforesaid in behalf of the syndicate there has been received some twenty thousand dollars or more from the District of Columbia for condemnation for street purposes of part of the land of said syndicate and assessments for benefit to tge amount of between Ten and Eleven thousand dollars have been laid against the same. That your complainants believe a part of the money received on account of the condemnation proceedings has been applied in reduction of the loan on the property at the insistence of the holders of the mortgages or deeds of trust and against the writ of complainants' trustees who wanted to use it to erect more costly and extravagant buildings. That complainants are informed and believe the assessments for benefit laid against your complainants' property have not been paid and still remain a charge against same. That of the twenty gouses erected by the defendant trustees some eleven now remain in the hands of the trustees as property belonging to your complainants and the other members of the syndicate and the other nine have been disposed of by way of trade or other process to other parties but the details of these transactions are unknown to your complainants, because though requested to furnish detailed information concerning the same the trustees never have made or given either a detailed, a satisfactory, or an intelligible account of their transactions for their cestuis que trust but have confined all their statements to their cestuis qve trust to brief reports from which it is impossible to tell in detail what charges have been made and what transactions have occurred. That your complainants are informed and believe that there still remain many thousand dollars indebtedness against the property, of which all or a large part is overdue and unpaid and your complainants fear that unless speedy steps be taken by the Court to pro-ect their interests that said interests will suffer a further depreciation and that they will be subjected to further heavy losses and that the property will be manipulated still more to the personal enrichment of the trustees and those connected with them.

13. That said Thomas G. Hensey and Mellen C. Hooker never have rendered full, correct, plain and detailed statements of accounts to your complainants and the syndicate shareholders although requested so to do. That the accounts as your complainants believe are not so kept that the items of expenditures can be readily
76 and properly sifted, classified, verified and analyzed and their propriety, necessity and legality determined except by the *iad* of a skilled accountant; that said Thomas G. Hensey, the managing one of the trustees, refused to give a list of shareholders to one of your complainants and only with great reluctance and after refusals and on threats of litigation gave such a list to another of your complainants; that shareholders when they came for information met rebuffs and refusal or evasions; that he neglected or refused to give axplanations to shareholders, his cestuis que trust, of the administration of said trust until one of them threatened litigation and

the appointment of a receiver, and had called on his co-shareholders to join him in legal proceedings; that even then said Thomas G. Hensey and Mellen C. Hooker at a meeting of shareholders refused to give any information whatsoever as to the price paid Mrs. Amanda Dean for the land, the length of time any other person held the land or any interest therein after Mrs. Amanda Dean had parted with her interest prior to its being turned over to the shareholders, and whether or not the organization of the syndicate had been initiated prior to the acquisition of any interest whatsoever in said land on the part of Melville Hensey or the trustees Thomas G. Hensey and Mellen C. Hooker or any one acting for them or either of them and likewise whether money had been received from the shareholders prior to Melville Hensey taking title to the land; that subsequent to the aforesaid shareholders' meeting, your complainant Charles W. Richardson demanded to see the books of the syndicate with his attorney and was informed that the trustees would consult their attorney first; that subsequently a meeting was arranged between the trustees and their attorney and complainant Charles W. Richardson, and his attorney, Charles H. Merillat, that after first declining, the trustees on advice of their counsel, permitted complainants' attorney to copy from the book of original shareholders *and* list of shareholders and dates of their first payments for shares; that said book*s* is not accurate in that whereas it represents that said Charles W. Richardson and the other shareholders all made their first payments on January 14, 1893, the fact is that said Charles W. Richardson made his first payment of $2,500 on January 12, 1893, as his check book shows and others of complainants, it is believed, likewise made their payments prior to the date named, though it does show that on the day Melville D. Hensey took title there had been paid in the full sum of $50,000 to be paid by the syndicate for the land; that when complainants' attorney demanded to see the construction or building book he met evasive replies and the statement that it was not posted and was not in a condition where it would be intelligible to any one but if complainants gave the trustees until the next semi-annual period, same months hence, the building accounts would be fixed up and explained; that the trustees had only approximated the cost of the buildings in their statements to shareholders. When your complainants' attorney requested to see the original letters sent to and received from stockholders and any records or minutes by which the trustees
77 claimed authority from a majority of the shareholders to build he was put off with the statement that he would have to wait sometime and that they were in among various cases and could not be produced for some indefinite time in the future, notwithstanding complainants' attorney at the shareholders' meeting nearly two weeks before, had asked and had been promised copies of them. That Complainants' attorney replied that they ought to be procurable within two hours and on July 15th gave defendant trustees two days to produce them but has been unable to obtain the same thus far. That your complainants were informed by the trustees shareholders exchanging shares for houses were allowed the amount they had

paid in for their shares, but your complainant has been advised by one such former shareholder that he was compelled to lose five hundred dollars on his share to make the exchange; that your complainants cannot state whether there are other such discrepancies but believe there should be a rigid scrutiny of all the trustees' accounts; that your complainants fear that unless the books, letters and records of the syndicate are required to be forthwith deposited in the registry of the Court the same, when this litigation is at issue, will have been spoliated or fixed up so as to conceal the real and true state of facts and accounts as they exist today and grievous injury will be done your complainants.

14. That your complainants as a result of the recently discovered fraud and misrepresentation of said Thomas G. Hensley, Mellen C. Hooker and Melville D. Hensey, and of the abuse by the trustees of the powers granted them, their illegal collection of fees and charges from the trust estate contrary to the trust reposed in said trustees as well as the rights of complainants, their mismanagement, extravagance, concealments and failure to keep important accounts in accessible and intelligent condition and to render accounts from which your complainants could have been apprised of the true situation of affairs have utterly lost faith and confidence in the said trustees and in their ability properly to manage said property, and complainants believe and say that the trust estate or syndicate should be wound up under the direction of this Honorable Court and a proper accounting required of the said Thomas G. Hensey and Mellen C. Hooker, as trustees and of Melville D. Hensey as agent of all parties interested in said trust estate or syndicate of all their acts and doings with reference to the aforesaid tract of land and dwellings erected thereon.

Wherefore, complainants pray as follows:

First. That process of subpœna may issue against the defendants, Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, whom they pray may be made parties defendant hereto, commanding them and each of them to appear in this Honorable Court by a day certain, and then and there answer the premises, answer under oath being hereby expressly waived, and to stand to and abide by such order and decree as to this Honorable Court may seem meet and proper.

Second. That Mellen C. Hooker, Thomas G. Hensey and Melville D. Hensey, be compelled to discover and set forth all and singular the book or books and a full and complete list of all documents, papers or records they — have in their possession
78 or custody or under their control showing transactions relating to the land described in this bill of complaint or transactions relating to or concerning the buildings erected on said land or transactions relating to said syndicate and also all matters or transactions by and between the said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey and Mrs. Amanda Dean or her agent, Joseph Paul, or by and between the defendants or any or all of them, collectively or individually, so far as the same have any reference to or grew out of their relationship to the syndicate or their relationship to each or one another because of their connection

with the said syndicate directly or indirectly. That Thomas G. Hensey be compelled to discover and set forth the name of the persons to whom he transferred two shares of his holdings in said syndicate, the relationship of said persons to himself, when the transfer was made, under what circumstances and the true consideration therefor. That the defendants be compelled to discover and set forth in detail all the facts and circumstances connected with the purchase from Mrs. Amanda Dean or her agent, Joseph Paul, of the land described in this bill of complaint, what was the true consideration therefor, by whom and at what date or dates any payments were made on account thereof, when and how they first learned the aforesaid land was for sale and at what price, what if any rights or interest in or refusal of said land described in this bill of complaint they or any of them had prior to actual transfer of the title to said land from Mrs. Amanda Dean, when and on what consideration the aforesaid land was bought and generally all and singular the facts in relation to the acquisition of title to said land in the name of Melville D. Hensey and the facts connected with the same.

Third. That the said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey be compelled to deposit in the Registry of the Court all the books, papers, accounts, vouchers, records or other papers of the said trust estate or syndicate herein referred to, except only the rent book, to await the further order of the Court.

Fourth. That the said defendants, Thomas G. Hensey and Mellen C. Hooker, may be required to disclose what persons are interested in said trust estate or syndicate, what that interest is, and what shares have been disposed of since the original organization of the syndicate, the dates on which they were disposed of, to whom and upon what consideration.

Fifth. That pending this suit a receiver may be appointed by this Court to take charge of all the property and assets of every nature and description belonging to the said trust estate or syndicate and hold the same subject to the order of this Court.

Sixth. That the said Thomas G. Hensey and Mellen C. Hooker, and each of them, be enjoined, pending this suit; and perpetually thereafter, from taking any further steps as trustee in and about the management of said property and said assets of said trust estate or syndicate as hereinbefore set forth or from disposing of or encumbering any of said property or real estate belonging to said trust estate or syndicate and now standing in their names or in their possession.

Seventh. That pending an accounting the said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey may be restrained
79 and enjoined from hypothecating, mortgaging, selling or disposing of, or placing beyond the jurisdiction of this Court, such certificates of interest or shareholdings as they or each of them may now have or hold in said trust or syndicate, and if necessary be required to deposit the same in the registry of the Court, the same to be held and disposed of by the further order of the Court.

Eig-th. That the said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey and each of them be required to account to your

complainants and other persons in like situation for the difference between the actual cost of said tract of land and the amount charged the syndicate therefore, namely, $150,000.

Ninth. That an account may be taken under the direction of the Court of all the acts and doings of said Hensey and Hooker or as trustees as aforesaid and that the said trust estate of syndicate may be wound up under the direction of this Court and such orders and decrees made as will establish and enforce the rights of each of the persons interested.

Tenth. That Thomas G. Hensey and Mellen C. Hooker be removed as trustees of said trust estate or syndicate and that the Court appoint other trustees in their stead or make such other order or decree in this regard as to it may seem meet and proper.

Eleventh. And for such other and further relief as to the Court may seem meet and proper.

CHARLES W. RICHARDSON.
JOSEPH W. LITTLE.
MARY B. CUMMINGS.
W. A. BEVARD.
F. H. CHITTENDEN.
FRANCIS E. GRICE.
B. RICHARDS.
GEORGE C. ESHER.
MARY A. HEINZ.
ALICE TITCOMB.
WILLIAM B. BRITTAIN.

CHAS. H. MERILLAT,
MASON N. RICHARDSON,
EUGENE CARUSI,
Solicitors for Compl'ts.

I do solemnly swear that I have read the foregoing bill by me subscribed, and knew the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

CHARLES W. RICHARDSON.

Sworn and subscribed to before me this 18th day of July A. D. 1903.

[SEAL.] WALTER C. BALDERSON,
Notary Public, D. of C.

80 COMPLAINANTS' EXHIBIT C.

Supreme Court of the District of Columbia.

MONDAY, *May* 28, 1906.

The Court resumes its session, pursuant to adjournment, Mr. Justice Stafford presiding.

No. 24084, Eq. Docket 54.

CHARLES W. RICHARDSON et al.
vs.
THOMAS G. HENSEY et al.

This cause coming on to be heard upon the pleadings testimony and other proceedings herein including the several Auditor's report filed herein on the 2nd day of February, 1906, and the 27th day of March, 1906, and after hearing argument by counsel for the respective parties hereto it is by the Court this 28th day of May A. D. 1906, ordered, adjudged and decreed as follows:

First. That the said Auditor's reports be, and the same hereby are, affirmed.

Second. That the defendants Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey he, and they hereby are decreed and declared jointly and severally to have received of the complainants, and the other parties to this suit, the members of the Le Droit Park Land Syndicate as a trust fund, and to have illegally withheld from said Syndicate or parties the sum of $25,896 — said trust fund, with compound interest thereon amounting on January 10, 1906, to the sum of $53,819.17, and said defendants aforesaid are ordered and directed to pay over said trust fund of $53,819.17, with interest thereon from January 10, 1906, to date of payment to Charles H. Merillat and Edward H. Thomas as trustees for the Le Droit Park Land Syndicate on or before the 20th day *day* of June A. D. 1906.

Third. That the defendants Thomas G. Hensey and Melville D. Hensey are decreed and declared to account to complainants and the other parties to this suit, the members of the Le Droit Park Land Syndicate, through their trustees, Charles H. Merillat and Edward H. Thomas, aforesaid, for the further and additional sum of $15,445.07, with interest thereon from the date hereof, and that the defendant Mellen C. Hooker is decreed and declared to account to the parties aforesaid through said trustees as aforesaid for the further and additional sum of $13,887.85, over and above the amount of trust funds found to be due by them.

Fourth. That the trustees hereinbefore named, Edward H. Thomas and Charles H. Merillat as trustees for the Le Droit Park Land Syndicate have a judgment and decree against the defendants Thomas G. Hensey and Melville D. Hensy for the hereinbefore mentioned sums of $53,819.17 with interest thereon from January 6, 1906, and for

the further and additional sum hereinbefore mentioned of
81 $15,445.07, and against the defendant Mellen C. Hooker for the hereinbefore mentioned sums of $53,819.17 with interest thereon from January 6, 1906, and for the further and additional sum hereinbefore mentioned of $13,887.85, besides the costs of this suit, said costs to be borne by all three defendants herein named, jointly and severally, including the costs of all proceedings before the Auditor, and a counsel fee of $5,000 to be paid to the attorneys for complainants herein, and that the trustees aforesaid, Edward H. Thomas and Charles H. Merillat, as trustees for the Le Droit Park Land Syndicate have execution thereon as at law.

Fifth. That there be, and hereby is, awarded to counsel for complainants in this cause, Mason N. Richardson, Charles H. Merillat, and Eugene Carusi, a fee of $9,000 for their services, said fee to be paid out of the funds or estate of the Le Droit Park Land Syndicate, or out of any moneys recovered hereunder from the defendants Thomas G. Hensey and Mellen C. Hooker, or Melville D. Hensey.

Sixth. That the trustees aforesaid are adjudged and decreed to hold the shares in the Le Droit Park Land Syndicate standing in the names of the defendants Thomas G. Hensey and Mellen C. Hooker and Melville D. Hensey on the books of the Le Droit Park Land Syndicate for the use of the said syndicate, and the said syndicate is declared to have a lien on said shares originally issued in the name of Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey for the sum of $500 unpaid purchase price on each of said shares, with interest thereon at the rate of 6 per centum per annum from January 19, 1893, and Thomas G. Hensey and Mellen C. Hooker and Melville D. Hensey are ordered and directed to turn over and deposit their original shares aforesaid with the aforesaid present trustees of the Le Droit Park Land Syndicate.

Seventh. That unless the money decreed of $53,819.17 hereinbefore directed to be paid, be satisfied on or before the 20th day of June, A. D. 1906, Thomas G. Hensey be, and he hereby is, adjudged to have held all his right, title and interest as of date the 24th day of August, 1903, the date of the service of an amendment to complainants' bill, naming said property as having been purchased with the fruits of the fraud perpetrated on his co-syndicate members by Thomas G. Hensey in and to the following described lands and premises, to wit:

Lot 19 in Section 3 of Barry Farm, a subdivision in the County of Washington, in the District of Columbia; Lot 13 in Loomis' subdivision of Square 65 in the City of Washington, District of Columbia, and Lot 51 in Gibbs' subdivision of Square 520 in the City of Washington, District of Columbia, as trustee for the Le Droit Park Land Syndicate, and he hereby is ordered and directed to make conveyance as of date August 24, 1903, and to have effect when recorded as of said date, of all his right, title and interest in the real estate aforesaid to Charles H. Merillat and Edward H. Thomas as trustees for the Le Droit Park Land Syndicate, and should said Thomas G. Hensey neglect or refuse to comply with this paragraph of
82 this decree, then this paragraph of this decree shall have the same operation and effect as if the conveyance had been exe-

cuted conformably to this decree, and said Charles H. Merillat and Edward H. Thomas are authorized and directed as trustees as aforesaid to sell said real estate described aforesaid in this paragraph, unless the same has been previously sold under some prior deed of trust or recorded obligation as hereinbefore set forth, free and discharged from the effect of any transfers or conveyances by said Thomas G. Hensey or his grantees not of record among the land records of the District of Columbia on or before the 24th day of August, 1903, aforesaid. The manner of said sale of the aforesaid real estate shall be as provided by Equity File Rule 91 of the Supreme Court of the District of Columbia. It is further declared, adjudged and decreed that all transfers or conveyances of said real estate not of record on or before said 24th day of August, 1903, aforesaid, but attempted to be recorded since said date, are subject and postponed to the provisions of this paragraph of this decree and satisfaction of the aforesaid sum of $53,819.17, unless the same have been made under the provisions of some deed of trust or other prior obligation of record prior to the aforesaid 24th day of August, 1903, and in the event that said real estate has been sold since said 24th day of August, 1903, under some prior valid deed of trust or other obligation of record prior to the 24th day of August, 1903, then all the right, title and interest of Thomas G. Hensey in the equity of redemption therein is vested in Charles H. Merillat and Edward H. Thomas, as trustees for the Le Droit Park Land Syndicate, and they are hereby authorized and directed to take such steps as may be deemed necessary by them to reduce such equity of redemption to possession.

Eighth. That unless the money decree of $53,819.17, hereinbefore directed to be made be satisfied on or before the 20th day of June, A. D. 1906, Mellen C. Hooker be and he hereby is, adjudged, to have held all his right, title and interest as of date the 24th day of August, 1903, the date of the service of an amendment to complainants' bill naming said property as having been purchased with the fruits of the fraud perpetrated on his co-syndicate members by Mellen C. Hooker in and to the south 32 feet by the full depth thereof of Lot 18, in Square 1110 in the City of Washington, District of Columbia, as trustee for the Le Droit Park Land Syndicate, and he hereby is ordered and directed to make conveyance as of date the 24th day of August, 1903, and to have effect when recorded as of said date of all his right, title and interest in the real estate aforesaid to Charles H. Merillat and Edward H. Thomas, as trustees for the Le Droit Park Land Syndicate, and should said Mellen C. Hooker neglect or refuse to comply with this paragraph of this decree, then this paragraph of this decree shall have the same operation and effect as if the conveyance had been executed conformably to this decree, and said Charles H. Merillat and Edward H. Thomas are authorized and directed as trustees as aforesaid to sell said south 32 feet by the full depth thereof of Lot 18, in Square 1110, in the City of Washington, District of Columbia, unless the same has been previ-
83 ously sold under some prior recorded deed of trust or recorded obligation as hereinafter set forth free and discharged from the effect of any transfers or conveyances by said Mellen C. Hooker

or his grantees not of record among the land records of the District of Columbia on or before the 24th day of August, 1903, aforesaid. The manner of such sale of the aforesaid real estate shall be as provided by Equity Rule 91 of the Supreme Court of the District of Columbia. It is further declared, adjudged and decreed that all transfers or conveyances of said real estate not of record on or before said 24th day of August, 1903, aforesaid, but attempted to be recorded since said date are subject and postponed to the provisions of this paragraph of this decree, and satisfaction of the aforesaid sum of $53,819.17, unless the same have been made under the provisions of some deed of trust or other prior obligation of record prior to the aforesaid 24th day of August, 1903, and in the event that said real estate has been sold since said August 24, 1903, under some prior valid recorded deed of trust or other obligation of record prior to the 24th day of August, 1903, then all the right, title and interest of Mellen C. Hooker in the equity of redemption therein is vested in Charles H. Merillat and Edward H. Thomas, as trustees for the Le Droit Park Land Syndicate and they are hereby authorized and directed to take such steps as may be deemed necessary by them to reduce such equity of redemption to possession.

Ninth. That unless the money decree of $53,819.17 hereinbefore directed to be made be satisfied on or before the 20th day of June A. D. 1906, Thomas G. Hensey be and he hereby is, adjudged to have held all his right, title and interest as of date the 24th day of August, 1903, the date of the service of an amendment to complainants' bill naming said property as having been purchased with the fruits of the fraud perpetrated on his co-syndicate members by Thomas G. Hensey in and to the following described real estate, a tract of land known as Dry Meadows in the County of Washington, District of Columbia, and more particularly described as follows: Beginning for the same at a stone marking corner of the late Charles R. Belt's land, and running thence 41¾ degrees east 57.84 perches to a stone thence north 44 degrees east 1.68 perches of a stone on Broad Branch Road thence 15½ degrees west 58.12 perches to Jones' line, thence north 60 degrees west 2.32 perches to a stone and place of beginning containing 9.40 acres of land, more or less, as trustee for the Le Droit Park Land Syndicate, and he hereby is ordered and directed to make conveyance as of date the 24th day of August, 1903, and to have effect when recorded as of said date of all his right, title and interest in the real estate aforesaid to Charles H. Merillat and Edward H. Thomas, as trustees for the Le Droit Park Land Syndicate, and should said Thomas G. Hensey neglect or refuse to comply with this paragraph of this decree then this paragraph of this decree shall have the same operation and effect as if the conveyance had been executed conformably to this decree, and said Charles H. Merillat and Edward H. Thomas are authorized and directed as trustees as aforesaid to sell the interest of Thomas G. Hensey in the aforesaid 9.40 acres of the aforesaid tract
84 known as Dry Meadows, free and discharged from the effect of any transfers or conveyances by said Mellen C. Hooker or his grantees not of record among the land records of the District

of Columbia, on or before the 24th day of August, 1903, aforesaid. The manner of such sale of the interest of the said Thomas G. Hensey in the aforesaid real estate shall be as provided by Equity Rule 91 of the Supreme Court of the District of Columbia. It is further declared, adjudged and decreed that all transfers or conveyances of the interest of said real estate not of record on or before said 24th day of August, 1903, aforesaid, but attempted to be recorded since said date, are subject and postponed to the provisions of this paragraph of this decree and satisfaction of the aforesaid sum of $58,819.17, unless the same have been made under the provisions of some deed of trust or other prior obligation of record prior to the aforesaid 24th day of August, 1903, and in the event that the interest of the said Thomas G. Hensey in the said real estate has been sold since said 24th day of August, 1903, under some prior valid recorded deed of trust or other obligation of record prior to the 24th day of August, 1903, then all the right, title and interest of said Thomas G. Hensey in the equity of redemption therein is vested in Charles H. Merillat and Edward H. Thomas, as trustees for the Le Droit Park Land Syndicate, and they are hereby authorized and directed to take such steps as may be deemed necessary by them to reduce such equity of redemption to possession.

Tenth. That unless the money decree of $53,819.17 hereinbefore directed to be made be satisfied on or before the 20th day of June, 1906, Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey, be, and they are hereby, adjudged and decreed to have made all their payments made subsequent to the 19th day of January, 1893, on account of their interests in what is described in these proceedings as the Norwood Real Estate Company; the District Investment Co. and the Ten Syndicate with the moneys of the Le Droit Park Land Syndicate, and they be, and are hereby, declared and decreed to hold their interests in said land companies and syndicate aforesaid, acquired by or through payments made since January 19, 1893, as trustees for the Le Droit Park Land Syndicate, and Charles H. Merillat and Edward H. Thomas as trustees for said Le Droit Park Land Syndicate are authorized and directed to take such steps as may be deemed necessary by them to reduce to possession such interests of said defendants in the said land companies and syndicate aforesaid, and to hold the same for the use and benefit of the Le Droit Park Land Syndicate, said trustees Charles H. Merillat and Edward H. Thomas to succeed to all rights and interests of said Thomas G. Hensey, Mellen C. Hooker and Melville D. Hensey in the said land companies or syndicate aforesaid, as of date of August 24, 1903.

By the Court.

WENDELL P. STAFFORD, *Justice.*

From the foregoing decree, the defendants in open court having noted and appeal to the Court of Appeals, the penalty of the bond for costs is hereby fixed at one hundred dollars.

WENDELL P. STAFFORD, *Justice.*

85 Supreme Court of the District of Columbia.

TUESDAY, *June* 5, 1906.

The Court resumes its session pursuant to adjournment, Mr. Justice Stafford, presiding.

No. 24084. Equity Docket 54.

CHARLES W. RICHARDSON et al.
vs.
THOMAS G. HENSEY et al.

This cause coming on to be heard on petition of Edward H. Thomas, Trustee, to be allowed to withdraw and resign as such trustee it is by the Court on consideration thereof this 5th day of June, 1906, Ordered that the resignation of said Edward H. Thomas as such trustee be and the same is hereby accepted, and the said trustee is hereby relieved from all duties as such on, from and after this day. And it is further Ordered that Mason N. Richardson be and he hereby is appointed trustee in place of said Edward H. Thomas with all the rights, powers and duties heretofore vested in said Edward H. Thomas in this cause, provided however that said Mason N. Richardson before entering on the discharge of said duties shall file herein his several bond to be approved by the court in and for the sum of ten thousand Dollars ($10,000) and further, that this cause be and the same is hereby referred to the Auditor of this court to state the account of the trustee Charles H. Merillat and Edward H. Thomas.

WENDELL P. STAFFORD, *Justice.*

M. 9 N. COMPLAINANTS' EXHIBIT D.

Liber 2460, Folio 346.

$2.50 Int. Rev. Stamps Affixed.

Deed.

Recorded Feb. 2nd, 1900, 3.56 p. m.

Melville D. Hensey et ux.
to
Bates Warren.

This indenture, Made this 24th day of January in the year of our Lord one thousand nine hundred by and between Melville D. Hensey and Edythe M. Hensey his wife, both of the City of Washington, District of Columbia parties of the first part, and Bates Warren of

said City and District party of the second part, Witnesseth,
86 that the parties of the first part, for and in consideration of Ten & 00/100 Dollars lawful money of the United States of America, to them in hand paid by the party of the second part, receipt of which, before the sealing and delivery of these presents is hereby acknowledged have given, granted bargained and sold aliened, enfeoffed, released conveyed and confirmed, and do by these presents give, grant, bargain and sell, alien, enfeoff release convey and confirm unto the party of the second part, his heirs and assigns forever, the following described land and premises, situate, lying and being in the County of Washington District of Columbia and distinguished as and being lots numbered thirty (30) thirty one (31) Thirty two (32) thirty three (33) and thirty five (35) in Seymour W. Tulloch's subdivision of lots 8 and 19 in Block three (3) of Washington Heights as per plat recorded in County Book No. 12 at page 54 of the records of the Survey-'s Office of the District of Columbia and also lots numbered Thirty two (32) and thirty four (34) in Seymour W. Tulloch's et al., subdivision of lot 30 in Block five (5) of Washington Heights, as per plat of said subdivision recorded in County Book 12 at page 55 of the aforesaid records, and also Lots numbered twenty seven (27) twenty eight (28) twenty nine (29) thirty one (31) thirty three (33) thirty four (34) thirty five (35) and thirty eight (38) in Seym*ore* W. Tullo*ck*'s et al. subdivision of lots in Block six (6) in Washington Heights as per plat recorded in Book County 12 at pages 57 and 58 of the Records of the Office of said Surveyor subject to encumbrances on said property now duly recorded, together with all and singular the improvements, ways easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining and all the estate right, title interest and claim either at law or in equity or otherwise however of the part- of the first part, of, in, to or out of the said land and premises. To have and to hold the said land premises and appurtenances unto and to the only use of the party of the second part, his heirs and assigns forever. And the said parties of the first part, for themselves their heirs, executors and administrators, do hereby covenant and agree to and with the party of the second part, his heirs and assigns, that they the parties of the first part and their he*ris*, shall and will warrant and forever defend the said land and premises and appurtenances unto the party of the second part, her heirs and assigns from and against the claims of all persons claiming or to claim the same, or any part thereof, or interest therein, by, from under or through them the said parties of the first part. And Further, that the parties of the first part and their he*ris* shall and will at any and all times hereafter upon the request and at the cost of the party of the second part his heirs and assigns make and execute all such other deed or deeds or other assurance in law, for the more certain and effectual conveyance of the said land and premises and appurtenances unto the party of the second part his heirs or assigns, as the party of the second part, his heirs or assigns, or his or their counsel learned in the law shall advise devise or require. In Testi-

mony Whereof the parties of the first part have hereunto set
87 their hands and seals on the day and year first hereinbefore written.

MELVILLE D. HENSEY. [SEAL.]
EDYTHE M. HENSEY. [SEAL.]

Signed, sealed and delivered in the presence of
ANSON S. TAYLOR.

UNITED STATES OF AMERICA,
District of Columbia, To wit:

I, Anson S. Taylor, a Notary Public in and for the said District do hereby certify that Melville D. Hensey and Edythe M. Hensey his wife parties to a certain Deed bearing date on the 24th day of January A. D. 1900, and hereunto annexed, personally appeared before me in the said District the said Melville D. Hensey and Edythe M. Hensey being personally well known to me as the persons who executed the said deed, and acknowledged the same to be their act and deed, and the said Edythe M. Hensey being by me examined privily and apart from her husband and having the Deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it.

Given under my hand and Official seal, this 30th day of January A. D. 1900.

A. S. TAYLOR,
Notary Public, D. C.

[NOTARIAL SEAL.]

OFFICE OF RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 2460 folio 346, et seq., one of the Land Records of the District of Columbia.

In Testimony Whereof I have hereunto set my hand and affixed the seal of this office this 1st day of June, A. D. 1907.

[SEAL.]

R. W. DUTTON,
Deputy Recorder of Deeds, Dist. of Col.

Certified Copy of Judgment and Proceedings.

Filed May 8, 1900.

DISTRICT OF COLUMBIA, *To wit:*

In Justice's Court, before Samuel R. Church one of the Justices of the Peace in and for the District aforesaid, this 7th day of May 1900, in the case of—

91

88 RARITAN HOLLOW AND POROUS BRICK CO., a Corporation, Organized and Existing under and by Virtue of the Laws of the State of New Jersey, Plaintiff,

vs.

MELVILLE D. HENSEY, Defendant.

Action for Debt. At Law. No. 43914. For $250.74 and Interest

Date.	Proceedings.
1900.	Plaintiff's attorney—S. Herbert Giesy.
April 10th.	Deposit of $10.00 by Giesy as non-resident security for costs.
" "	Affidavit of R. P. Keasbey, filed.
" "	Summon's (copy 1) to Wm. F. Salter, returnable April
" "	21st—2 P. M.
" "	Summon's returned, "summoned as within directed."
April 21st.	Defendant did not appear.
" "	Continued for judgment to April 23rd—10 A. M.
April 23rd.	Judgment for plaintiff, for want of affidavit of defense,
" "	for $250.74, interest from August 4th—1899 at 6%
" "	per annum and costs.

May 2nd, 1900.—Execution issued to William F. Salter Constable, who on the 7th day of May 1900, duly returned the same "no personal property found whereon to levy."

SAMUEL R. CHURCH, *J. P.* [SEAL.]

I, Samuel R. Church, one of the Justices of the said County and District, do hereby certify that the foregoing is a true copy of the judgment and proceedings in the above cause.

Given under my hand and seal this 7th day of May 1900.

Cost paid by Plaintiff..... $2.90
Cost paid by Defendant..... $——

SAMUEL R. CHURCH, *J. P.* [SEAL.]

Supreme Court of the District of Columbia.

TUESDAY, *March* 6, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

* * * * * * *

At Law. No. 43682.

FRANCIS A. BELT and WILLIAM H. DYER, Copartners, Trading as Belt & Dyer, Pl'ffs,

v.

EDGAR C. KELLOGG, MELVILLE D. HENSEY, and JOHN W. CRANFORD, Defendants.

The plaintiffs having duly verified their demand, come here now by their attorney Hayden Johnson and pray judgment
89 thereon against defendant Melville D. Hensey who, though served with copies of the declaration, notice to plead and sum-

mons on the 7th day of February, 1900, hath not pleaded to the action: Therefore it is considered that the plaintiffs recover against said Melville D. Hensey Six hundred dollars ($600) with interest thereon from the 20th day of October, 1899, at 6% per annum until paid, being the money payable by said defendant to the plaintiffs by reason of the premises, together with their costs of suit to be taxed by the Clerk, and have execution thereof.

Supreme Court of the District of Columbia.

THURSDAY, *December* 6, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

At Law. No. 44286.

GEORGE C. PUMPHREY and GEORGE N. PALMER, Trading as Pumphrey and Palmer, Pl'ffs,
v.
JOHN W. CRANFORD, MELVILLE D. HENSEY, EDGAR C. KELLOGG, Defendants.

The plaintiffs having duly verified their demand, come here now by their attorneys Leighton and James and pray judgment thereon against defendants John W. Cranford and Melville D. Hensey who, though served with copies of the declaration, notice to plead and summons on the 8th and 10th days of November, 1900, respectively, have not pleaded to the action: Therefore it is considered that the plaintiffs recover against said John W. Cranford and Melville D. Hensey Seven hundred dollars ($700), with interest on $450.00 from the Second day of February, 1900, being the money payable by said defendants to the plaintiffs by reason of the premises, together with their costs of suit to be taxed by the Clerk, and have execution thereof.

Supreme Court of the District of Columbia.

TUESDAY, *June 11th*, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, Justice, presiding.

* * * * * * *

No. 44605. At Law.

GEORGE E. ESHER, Plaintiff,
v.
ADAM MCCANDLISH, MELVILLE D. HENSEY, Defendants.

The plaintiff having duly verified his demand, comes here now by his attorneys Messrs. Hufty and Hufty and prays judgment

thereon against the defendants who, though served with
90 copies of the declaration, notice to plead affidavit and summons, on the 5th day of April 1901, hath not pleaded to the action: Therefore, it is considered that the plaintiff recover against said defendants, Adam McCandlish, and Melville D. Hensey, the sum of Four Hundred ($400.00) Dollars, with interest thereon at the rate of 6% per annum from the 5th day of January, 1900; and $2.24 charges of protest being the money payable by said defendants to said plaintiff by reason of the premises, together with their costs of suit, to be taxed by the Clerk, and have execution thereof.

Declaration and Notice to Plead.

Filed July 23, 1901.

In the Supreme Court of the District of Columbia.

Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

The plaintiff, Melville D. Hensey, sues the defendant, The Mercantile Trust Company, a corporation, for that whereas defendant heretofore, to wit, on the twenty-fourth day of January in the year of our Lord one thousand nine hundred, at the City of Washington, District of Columbia, by its certain writing obligatory sealed with its seal and now shown to the Court here, the day whereof is the day and year last above written, acknowledged itself to be held and firmly bound unto the plaintiff in the sum of Fifty Thousand Dollars ($50,000.00) to be paid to the said plaintiff; yet the said defendant although requested so to do, has not as yet paid the said sum of money or any part thereof to the said plaintiff, but has wholly neglected and refused and still neglects and refuses so to do.

Wherefore the plaintiff claims the sum of Fifty Thousand Dollars ($50,000.00) besides costs of this suit.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

The defendant is to plead hereto, on or before the twentieth day, exclusive of Sundays, and legal holidays, occurring after the day of service hereof; otherwise judgment.

BIRNEY & WOODARD,
Attorneys for Plaintiff.

91 *Order for Entry to Use, &c.*

Filed October 20, 1903.

In the Supreme Court of the District of Columbia, the 15th Day of February, 1902.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Def't.

The Clerk of said Court will please enter this cause to the use of Frederick Mertens, and Park Agnew.

MELVILLE D. HENSEY, *Plaintiff.*
BIRNEY & WOODARD,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

MONDAY, *February* 1, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

At Law. No. 44822.

MELVILLE D. HENSEY, Pl'ff,
v.
THE MERCANTILE TRUST COMPANY, a Corp., Def't.

Come here again the parties aforesaid, in manner aforesaid, and the same jury return into Court, and upon their oath say they find said issues in favor of the plaintiff, and the money payable to him by the defendant by reason of the premises, is the sum of Eighteen thousand two hundred and fifty dollars ($18250).

THURSDAY, *May* 18*th*, 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

No. 44822. At Law.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, Defendant.

Come again the parties hereto aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who after further

hearing the case and being given the same in charge, upon
92 their oath say they find the issues herein in favor of the plaintiff, and assess his damages by reason of the premises in the sum of Eight Thousand Four Hundred and sixty-eight dollars.

MONDAY, *June 12th*, 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * * * *

No. 44822. At Law.

MELVILLE D. HENSEY, Plaintiff,
vs.
THE MERCANTILE TRUST COMPANY, a Corporation, Defendant.

Upon consideration of defendant's motion in arrest of judgment filed herein, it is ordered that said motion be, and is hereby overruled; to which ruling the defendant's attorney noted exception.

Further, upon hearing defendants' motion for a new trial herein filed, it is ordered that said motion be, and is hereby overruled, and judgment is ordered: Whereupon, it is considered and adjudged, that the plaintiff herein recover of the defendant herein, the sum of Eight Thousand Four Hundred and sixty-eight dollars, for his damages as aforesaid assessed, with interest thereon from this date, together with his costs of suit to be taxed by the clerk and have execution thereof

From the aforegoing, the defendant notes an appeal, and prays that bonds be fixed: Whereupon it is hereby ordered that defendant furnish bond herein in the sum of One Hundred Dollars, for costs or to operate as a supersedeas in the sum of Twelve Thousand Dollars, with surety or sureties to be approved by this court.

Further, upon motion the time within which to settle the bill of exceptions and to file a transcript of record in the Court of Appeals, is hereby extended to September 30th, 1905, inclusive.

Mandate.

Filed May 29, 1907.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of
[SEAL.] Columbia, Greeting:

Whereas, lately in the Supreme Court of the District of Columbia, before you, or some of you, in a cause between Melville D. Hensey, Plaintiff, and The Mercantile Trust Company, a corporation, defendant, Law No. 44822, wherein the judgment of the said Supreme Court entered in said cause on the 12th day of June, A. D. 1905, is in the following words, viz:

93 Upon consideration of defendant's motion in arrest of judgment filed herein, it is ordered that said motion be, and is hereby overruled; to which ruling the defendant's attorney noted exception.

Further, upon hearing defendant's motion for a new trial herein filed, it is ordered that said motion be, and is hereby overruled, and judgment is ordered. Whereupon it is considered and adjudged that the plaintiff herein recover of the defendant herein, the sum of Eight Thousand and Four Hundred and sixty-eight dollars, for his damages as aforesaid assessed, with interest thereon from this date, together with his costs of suit to be taxed by the Clerk and have execution thereof.

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of January, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs; and that the said plaintiff, Melville D. Hensey, recover against the said defendant for his costs herein expended and have execution therefor.

March 7, 1906.

And whereas said cause was removed to the Supreme Court of the United States by virtue of an appeal taken by The Mercantile Trust Company, agreeably to the Act of Congress in such case made and provided.

And whereas at the October Term, A. D. 1906, of the said Supreme Court of the United States, the following judgment was entered, viz:

"It is now here ordered and adjudged by this Court that the judgment of the said Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that the said appellee, Melville D. Hensey, recover against the said appellant for his costs herein expended and have execution therefor.

April 8, 1907.

as by the inspection of the mandate of the said Supreme Court of the United States fully and at large appears.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 20th day of May in the year of our Lord one thousand nine hundred and seven.

94 *Costs of Plaintiff.*

Clerk ..... $.....
Attorney ..... $.....
Printing Record ..... $.....

Paid.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Order Dismissing Bill.

Filed February 28, 1908.

In the Supreme Court of the District of Columbia.

Eq. No. 26989.

CHARLES H. MERILLAT et al., Trustees,
vs.
MELVILLE D. HENSEY et al.

This cause coming on for final hearing on the bill, answer, pleadings and testimony filed herein and after argument by counsel it is by the Court this 28th day of February 1908 Adjudged, Ordered and Decreed that the same be and hereby is dismissed with costs in favor of defendants. And thereupon counsel for complainants noted an appeal in open court and the same was allowed and bond to act as a supersedeas fixed at and in the sum of fourteen thousand dollars.

ASHLEY M. GOULD, *Justice.*

Memorandum.

February 28, 1908.—Bond on appeal filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed March 2, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

Equity. No. 26989.

CHARLES H. MERILLAT et al.
vs.
FREDERICK A. MERTENS et al.

The Clerk will please prepare the record in this cause for appeal to the Court of Appeals of the District of Columbia, said record to consist of the following proceedings:

95 Bill with interrogatories;
Answer of Mercantile Trust Company;
Answer of Melville D. Hensey;
Answer of Frederick Mertens and Park Agnew, with exhibits;
Fact of issue.

All the evidence, excepting exhibit of record of transcript, on appeal in case of Mercantile Trust Company et al. vs. Melville D. Hensey, et al. Court of Appeals, No. 1180, at page 106 of the Evidence, paragraph three of said transcript of bill being the only material part thereof to this cause, and said paragraph three being already copied into this record. But give the title to the bill in said cause, and date of filing, and affidavit to the said bill.

Copy of Bill in Equity No. 24084, omitting exhibits; but give date of filing said bill.

Decree and supplemental decree in Equity No. 24084, filed as exhibits pages 142 to 151 of the record of the evidence.

Copy of the entry of judgment and date thereof in cause at law No. 43914 (p. 72 of testimony).

Copy of entry of judgment in cause at law No. 43682, and date thereof (p. 73 of testimony).

Copy of entry of judgment in cause at law No. 44605, and date thereof (p. 73 of evidence).

Copy of entry of judgment in cause at law No. 44286 and date thereof (p. 73 of evidence).

Copy of the order of præcipe filed October 20, 1903, in cause at law No. 44822, and date of filing thereof, showing entry of cause to use of Mertens and Agnew (p. 73 of evidence).

Copy of the entry of first verdict (m. 45 p. 92) in case of Hensey v. Mercantile Tr. Co. at law No. 44822.

Copy of declaration in said cause at law No. 44822 with accompanying affidavits.

Copy of entry of second verdict of May 18, 1905, in said cause at law No. 44822 (p. 76 evidence).

Copy of final judgment in same cause (p. 76 evidence) of June 12, 1905.

Copy of Mandate of the Court of Appeals, May 29, 1907 affirming said judgment; also copy of mandate of Supreme Court U. S. same cause at law No. 44822. (ev. p. 76-77.)

Copy of deeds pages 152 to 154, inclusive of evidence.

Copy of the final decree in this cause No. 26989, showing note of appeal in open Court;

Bond on appeal, and approval thereof, with date.

Copy of this order.

CHARLES H. MERILLAT,
MASON N. RICHARDSON,
Solicitors for Complainants.

Service of copy of the above acknowledged this 2 day of March 1908.

BIRNEY & WOODWARD,
Att'ys for Defendants.

96 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 190, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 26989, Equity, wherein Charles H. Merillat and Mason N. Richardson, Trustees, are Complainants, and Melville D. Hensey, et als. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 17th day of March, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1879. Charles H. Merillat et al., appellants, vs. Melville D. Hensey et al. Court of Appeals, District of Columbia. Filed Mar. 17, 1908. Henry W. Hodges, clerk.

97 THURSDAY, *October 8th, A. D.* 1908.

No. 1879.

CHARLES H. MERILLAT and MASON N. RICHARDSON, Trustees, Appellants,
vs.
MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, and PARK AGNEW.

The argument in the above entitled cause was commenced by Mr. M. N. Richardson, attorney for the appellants, and was continued by Messrs. H. F. Woodard and A. A. Birney, attorneys for the appellees.

FRIDAY, *October 9th, A. D.* 1908.

No. 1879.

CHARLES H. MERILLAT and MASON N. RICHARDSON, Trustees, Appellants,
vs
MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, and PARK AGNEW.

The argument in the above entitled cause was continued by Mr. A. A. Birney, attorney for the appellees, and was concluded by Mr. C. H. Merillat, attorney for the appellants.

98 No. 1879.

CHARLES H. MERILLAT and MASON N. RICHARDSON, Trustees, Appellants,
vs
MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, and PARK AGNEW.

Opinion.

Mr. Justice Robb delivered the opinion of the Court:

This cause originated in a bill filed by appellants, as complainants below, against Melville D. Hensey, Mercantile Trust Company, Frederick A. Mertens and Park Agnew, appellees here, to avoid an assignment by Hensey to Mertens and Agnew on the ground that said assignment was made with intent to hinder, delay and defraud other creditors.

The bill alleged that complainants as trustees on May 21, 1906, obtained a judgment against said Hensey for more than $67,000; that on June 12, 1905, said Hensey in a suit at law in which he was plaintiff obtained a judgment against said Mercantile Trust Company in the sum of $8,468, with costs:

"That being the owner of said judgment against the said Mercantile Trust Company, corporation, the said defendant Melville D. Hensey, who then and long prior thereto had been indebted to your complainants and other persons, and who was also then insolvent, in fraud of the rights of your complainats and of his creditors, and for the purpose of hindering, delaying and defrauding them and defeating the just claims of his creditors, and without consideration, in whole or in part, as your complainants are informed and believe, and so believing aver, assigned all his right, title and interest in said judgment as of record, to the defendants the said Frederick A. Mertens and the said Park Agnew, and said assignment of record was made on or about the 3rd day of March, 1903. Your complainants are informed and believe, and so believing aver, that if either said Mertens or Agnew, or both of them had any claim against the said Melville D. Hensey, the true and exact amount of the indebtedness justly due by said Melville D. Hensey to them or either of them, was and is far below the amount of said judgment, and that said entire judgment was conveyed or assigned by said Melville D. Hensey to them upon a secret agreement and arrangement that they shall refund or repay to him the amount thereof, in excess of the claim of them or either of them against him."

The bill required the defendants, Mertens and Agnew, to answer under oath and disclose the amount paid, if any, upon the assignment of said judgment to them, and the arrangement or agreement between them in respect of the repayment to said Hensey of the balance or amount over and above their claim, if any. Interrogatories were submitted to each defendant and all save Hensey were required to answer under oath.

Hensey in his answer admitted the judgment against the trust company; averred he had no interest in it; that on the 21st of October, 1903, he assigned it to Mertens and Agnew. He denied that the assignment was made to hinder, delay, or defraud creditors, and averred that it was made in good faith and to secure an indebtedness of $7,300 to Mertens and Agnew and a loan by them of $250.

The joint answer of Mertens and Agnew admitted the assignment by Hensey to them, denied fraud, and averred the amount due them, including costs and counsel fees, was in excess of the judgment assigned them. Their answer admitted that concurrently with the assignment an agreement was entered into between them and Hensey which provided that from the proceeds of any judgment that might be recovered costs and attorneys' fees should first be paid; secondly, their claim, and any balance to Hensey; that the amount of the judgment was not sufficient to pay costs, attorneys' fees, and their claim.

The facts, as developed by the proof, are these:

On July 23, 1901, Hensey, through Birney & Woodard as his attorneys, filed a suit in the Supreme Court of the District of Columbia against the Mercantile Trust Company on a bond given by said company to said Hensey for $50,000. Hensey was then in failing circumstances as evidenced by the fact that between April 23, 1900, and June 11, 1901, four judgments for $259.74, $600, $700, and $400, respectively, were rendered against him, which at the time of the bringing of the suit against the trust company were outstanding and unpaid, and, so as the record discloses, are still outstanding and unpaid. Other liabilities were also then outstanding.

Mertens testified that the firm of Mertens & Agnew in 1899 sold one Kellogg brick, the payment for which was guaranteed by Hensey; that it was then understood that cash would be paid, but
99 that when Hensey was unable to pay cash the firm accepted his notes, no account being kept of the transaction as a settlement would be made every week or two by the surrender to Hensey of brickyard delivery slips in exchange for his notes. These notes were renewed from time to time and were still outstanding and aggregated over $7,300 when Hensey assigned his suit against the trust company.

Mertens further testified that at the time of the assignment of this suit against the trust company Hensey did not have anything and could not have stood the costs of suit. Mertens was asked to produce the books of the firm of Mertens and Agnew for the years 1899 and 1900, but declined to do so on the ground that they contained no account with Kellogg and Hensey.

Agnew testified that he was present when the assignment was made, and that there was discussion about Hensey's affairs. He was asked: "Did it concern his debts?" and answered: "I suppose that is about the only thing it concerned, but I could not swear to that." He further testified to having read a newspaper article published July 20, 1903, containing an account of the suit against Hensey which culminated in said judgment for $67,000.

A precipe was offered in evidence dated February 15, 1902, and

directing the clerk of the Supreme Court of the District to enter the cause of Hensey v. Trust Company to the use of Mertens and Agnew. This was filed in the Supreme Court of the District on October 20, 1903. There was also put in evidence the assignment of said suit by Hensey to Mertens and Agnew as follows:

"In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILLE D. HENSEY, Plaintiff,
v.
MERCANTILE TRUST COMPANY, Defendant.

For value received, I hereby sell, assign, transfer and set over to Frederick Mertens and Park Agnew my cause of action in the above entitled suit, and all the proceeds which may be derived from the prosecution thereof and from any judgment which may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact. In witness whereof I have hereunto set my hand, this twenty-first day of October, 1903.

MELVILLE D. HENSEY."

Concurrently with this assignment the following agreement was entered into:

"This agreement entered into this twenty-first day of October, 1903, between Frederick Mertens and Park Agnew, parties of the first part, and Melville D. Hensey, party of the second part;

Whereas the party of the second part has this day executed an assignment of his cause of action against the Mercantile Trust Company, at Law No. 44,822, in the Supreme Court of the District of Columbia;

Now, therefore, it is agreed and understood between the parties that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit, or any other suit involving the same issues, that there shall first be paid cost and attorneys' fees; secondly, the claim of Mertens and Agnew against Melville D. Hensey, and any balance then remaining over to the said Hensey.

Witness the signatures and seals of the parties, this twenty-first day of October, 1903.

FREDERICK MERTENS.
PARK AGNEW.
MELVILLE D. HENSEY."

The assignment was filed with the clerk of the Supreme Court of the District, but the agreement was retained by Birney & Woodard.

A verdict was obtained on February 1, 1904, in this suit against the Trust Company for $18,250. This was set aside and a new trial had which resulted in a verdict and judgment in the sum of $8,468.

Immediately upon the affirmance of said judgment by the Supreme Court of the United States appellants filed their bill herein. The court below after final hearing on bill, answer, pleadings, and testimony, dismissed the cause with costs in favor of defendants. This appeal ensued.

We have examined the record with care, and are convinced that Hensey at the time that he made the assignment in question was indebted to Mertens and Agnew as they contend. While their transactions with him and the methods of bookkeeping employed were a little unusual, we are not prepared in the absence of proof, to question their testimony. They appear to be reputable business men and aside from the careless manner in which they dealt with Hensey, there is no reason to question the *bona fides* of their claim against him.

A *bona fide* debt existing, Hensey has a perfect right to prefer Mertens and Agnew over other creditors, provided the preference was not given with intent to hinder, delay or defraud other creditors

Unquestionably the taking of this absolute assignment by Mertens and Agnew from their insolvent debtor Hensey and entering into what must be considered as a secret arrangement to pay him any overplus, constitutes a badge of fraud. Under the Code (section 1120) intent to defraud is made a question of fact and not of law. We are, therefore, of the opinion that while the transaction on its face is presumptively fraudulent, yet, nevertheless, that presumption is rebuttable—that is, susceptible of explanation. If, then, from all the facts and circumstances surrounding the case we find the acts of the parties to be consistent with an honest purpose, and that other creditors were not in fact prejudiced, we are not required to avoid the assignment.

Mr. Justice Brown, in Huntley v. Kingman (152 U. S., 532), said: "The tendency of courts in modern times has been, not to hold instruments of this character to be fraudulent and void upon their face, unless they contain provisions plainly inconsistent with an honest purpose, or the instrument indicates with reasonable certainty that it was executed, not to secure bona fide creditors, but to enable the debtor to continue to carry on his business under cover of another's name."

In the instant case the favored creditors did not in fact obtain enough from the suit assigned them to liquidate their claim against the debtor. The claim was worth no more when it was assigned than when they recovered final judgment thereon. It was a suit on an indemnity bond, and although it had then been in court two years no progress appears to have been made in its prosecu-
100 tion. The debtor had no funds to prosecute it, and no steps were taken by creditors, including appellants, to reach the debtor's interest therein; neither were any steps taken to assist in its prosecution. The appellees were not, therefore, taking an assignment of a *chose* in action or fixed and certain value, but were buying a law suit with the costs and expenses incident thereto. We think there can be no doubt that had they given Hensey no defeasance agreement, the transaction would have been a perfectly

legitimate one. In other words, had they, in consideration of the extinguishment of their claim against Hensey, taken the assignment in question, other creditors could not have complained even though the assignees ultimately recovered more than their claim, for the obvious reason that the consideration for the assignment in the circumstances of the case would not have been so inadequate as to have avoided the transaction. That the actual value of the thing assigned was not greater than Hensey's indebtedness to the assignees is clear in the light of the fact that the judgment ultimately obtained was not sufficient to liquidate that indebtedness. In the circumstances of this case it seems to us inequitable and illogical to set aside this assignment because of the agreement as to overplus, when but for that agreement the transaction would not have been open to question. It must have appeared to Mertens and Agnew at the time the assignment was taken, as testified to by their counsel, Mr. Woodward, that it was extremely doubtful whether there would be any overplus. It must have appeared equally as doubtful to other creditors because no questions were asked either Mertens or Agnew concerning the transaction. Had any creditor solicited information on the subject and received an evasive and misleading reply, this case would be on an altogether different basis. That they did not do so indicates a willingness on their part to refrain from action until these diligent creditors had prosecuted the claim assigned them to a successful issue.

For two years prior to the assignment of this suit against the trust company there was nothing to prevent creditors from instituting bankruptcy proceedings against this debtor and prosecuting the suit for the benefit of all creditors. Their failure to do so has a distinct bearing, in our view, on the question as to what was the then understood value of that suit. It will not do to say the suit had been commenced and that it was not incumbent upon them to act until its termination, because the record shows that the debtor was unable to prosecute the suit and that but for the diligence of appellees it might have gone by default.

In this case the debtor parted absolutely with dominion and control over the thing assigned. Hensey's interest was completely extinguished except in the very uncertain event of an overplus, an event probably not expected by anyone. It seems, therefore, that this agreement as to overplus in the circumstances of this case was a mere incident to and not in any sense the reason for the assignment. Under the authority of Leitch v. Hollister (4 N. Y., 211) the reasoning of which was adopted by the Supreme Court in Huntley v. Kingman, *supra*, this overplus agreement would not have been deemed fraudulent had it been made public. The case then narrows itself down to the question whether the mere fact that this agreement was not made public avoids the assignment. It must be borne in mind that we are not dealing with a mortgage which must be recorded; neither are we dealing with a case where the slightest misrepresentations, aside from that imputable to the instrument itself, have been made. Counsel might have entertained an honest doubt as to whether or not they could absolutely control

the prosecution of the suit assigned unless it appeared that their assignment was absolute. Entertaining that view, there was no place where the defeasance agreement could have been recorded, and we are unable to discover wherein the other creditors were in the slightest degree prejudiced because of the failure on the part of the assignees to publish the fact of this defeasance agreement.

In Muchmore v. Rudd (53 N. J. L., 369) this question was carefully and exhaustively treated. There a verbal agreement as to overplus accompanied the bill of sale of the insolvent debtor to a third person for the benefit of preferred creditors. The court treated the transfer as a mortgage, and after reviewing the authorities held that inasmuch as the thing assigned was of less value than the debts secured nothing was fraudulently put beyond the reach of creditors. There was a dissenting opinion in the case, but it was put upon other grounds, the writer of the opinion regarding the question as to the reservation of the surplus as "one of very minor importance" in that case.

In the present case the thing assigned was of uncertain value and its subsequently ascertained value proved to be less than the debt preferred. The preferred creditors were compelled to expend a very substantial sum of money and considerable time and effort in recovering on the suit assigned them. Because it is now discovered that when they took the assignment they were not actuated by a desire to retain out of the proceeds thereof more than their claim and actual expenses, we are asked to hold that they perpetrated a fraud upon other creditors, and this notwithstanding that it must then have been clear to them that a surplus was a very remote contingency.

An honest debt existing, all fraud being denied, no actual fraud or deceit being shown, and the value of the thing assigned being less than the debt, we do not believe equity requires us to deprive these diligent creditors of the fruit of their efforts.

The decree below will be affirmed with costs.

Affirmed.

101 WEDNESDAY, *November 4th, A. D.* 1908.

No. 1879, October Term, 1908.

CHARLES H. MERILLAT and MASON N. RICHARDSON, Trustees, Appellants,
vs
MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, and PARK AGNEW.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged

and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE ROBB,

November 4, 1908.

FRIDAY, *November 13th, A. D.* 1908.

No. 1879.

CHARLES H. MERILLAT and MASON N. RICHARDSON, Trustees, Appellants,

vs

MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK A. MERTENS, and PARK AGNEW.

On motion of Mr. C. H. Merillat, of counsel for the appellants in the above entitled cause, It is ordered by the Court that said appellants be allowed an appeal to the Supreme Court of the United States, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars.

102 (*Bond on Appeal.*)

Know all men by these presents, That we, Charles H. Merillat and Mason N. Richardson, Trustees, as principal, and Charles W. Richardson, as surety, are held and firmly bound unto Frederick A. Mertens and Park Agnew and Melville D. Hensey in the full and just sum of Ten thousand ($10,000.00) dollars, to be paid to the said Frederick A. Mertens, Park Agnew and Melville D. Hensey certain attorney-, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 19th day of November, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Charles H. Merillat and Mason N. Richardson, Trustees, Appellants, against Frederick A. Mertens, Park Agnew and Melville D. Hensey, Appellees, a decree was rendered against the said Charles H. Merillat and Mason N. Richardson and the said Charles H. Merillat and Mason N. Richardson, Trustees, having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Melville D. Hensey, Frederick A. Mertens and Park Agnew, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Charles H. Merillat and Mason N. Richardson, Trustees, shall prosecute said appeal to effect, and answer all damages and costs if

— fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

MASON N. RICHARDSON, [SEAL.]
CHARLES H. MERILLAT, [SEAL.]
Trustees.
CHARLES W. RICHARDSON. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
EDWIN E. DALY.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

O. K.
BIRNEY & WOODARD,
Att'ys for Appellees.

[Endorsed:] No. 1879. Charles H. Merillat and Mason N. Richardson, Trustees, Appellants, vs. Melville D. Hensey, Mercantile Trust Company, Frederick A. Mertens and Park Agnew. Bond on Appeal to Supreme Court United States. Court of Appeals, District of Columbia. Filed Nov. 20, 1908. Henry W. Hodges, Clerk.

103 UNITED STATES OF AMERICA, *ss:*

To Melville D. Hensey, Mercantile Trust Company, Frederick A. Mertens and Park Agnew, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Charles H. Merillat and Mason N. Richardson, Trustees, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 20th day of November, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted this 20th day of November, A. D. 1908.
BIRNEY & WOODARD.
HENRY F. WOODARD.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 20, 1908. Henry W. Hodges, Clerk.

104 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 103 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Charles H. Merillat and Mason N. Richardson, Trustees, Appellants, vs. Melville D. Hensey, Mercantile Trust Company, Frederick A. Mertens and Park Agnew, No. 1879, October Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 21st day of November, A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,429. District of Columbia, Court of Appeals. Term No. 107. Charles H. Merillat and Mason N. Richardson, trustees, appellants, vs. Melville D. Hensey, Mercantile Trust Company, Frederick A. Mertens, and Park Agnew. Filed December 2d, 1908. File No. 21,429.

Supreme Court of the United States.

OCTOBER TERM, 1910.

CHARLES H. MERILLAT and MASON N. RICHARDSON, Trustees, *Appellants.*
vs.
MELVILLE D. HENSEY, et al., *Appellees.*
No. 107.

BRIEF ON BEHALF OF APPELLANTS.

This is an appeal from a decree and opinion of the Court of Appeals of the District of Columbia (Trans. Rec. 101-106) affirming a decree of the Supreme Court of the District of Columbia dismissing with costs (Trans. Rec. p. 98) a bill filed by appellants (Rec. p. 1) seeking to enjoin Frederick A. Mertens and Park Agnew, partners trading as Mertens & Agnew, from collecting a judgment against the Mercantile Trust Company recovered by Melville D. Hensey, who had assigned of record to Mertens and Agnew all his interest in the suit in which the judgment was rendered, the bill alleging the assignment was void as given to hinder, delay and defraud appellants and other judgment creditors of Hensey and asking the amount of the judgment be paid into the registry of the court to be applied for the benefit of all Hensey's judgment creditors. The bill alleged and the evidence in support thereof it is conceded es-

tablished that Hensey at and prior to the time he made the assignment was insolvent, to the knowledge of Mertens & Agnew (Rec. 102), and that whereas he made and there was filed of record in the office of the Clerk of the Supreme Court of the District of Columbia in the cause in which Hensey later recovered the judgment, an absolute assignment (Rec. 8, 103) of all his claim or chose in action against the Mercantile Trust Company there was executed contemporaneously a secret agreement signed by Mertens, Agnew and Hensey (Rec. 8, 103), whereby it was covenanted that in the event Hensey recovered a judgment against the Trust Company there should be paid out of the proceeds of the judgment first costs and attorneys' fees; second, an unpaid claim Mertens & Agnew had against Hensey, and third, that any balance remaining should be paid over to Hensey. Contemporaneously with the execution of the assignment and secret agreement Hensey signed a precipe, which seems to have been prepared but not signed more than a year previously, directing entry (Rec. 95) of his cause, then pending in court, against the Mercantile Trust Company to the use of Mertens & Agnew, this precipe and the absolute assignment to Mertens & Agnew being filed in the cause in the Clerk's office of the Supreme Court of the District of Columbia. Hensey's affairs and his debts and the papers were discussed pro and con before signature of the papers (Rec. 39, 62). The secret agreement reserving any surplus to Hensey was kept in the safe of Birney & Woodard, who at that time, October 20, 1903, and both before and after the arrangements referred to were made, were the common attorneys of both Hensey and of Mertens & Agnew (Rec. 44). Hensey at this time had a number of judgment creditors (Rec. 91, 102)

and less than three months previously appellants, or rather, those for whom they are trustees, to the knowledge of Mertens & Agnew (Rec. 54), had filed a suit against Hensey, accusing him of gross frauds in connection with a land syndicate (Rec. 69), the suit subsequently resulting in appellants recovering an, as yet, unsatisfied decree against Hensey for more than sixty-seven thousand dollars (Rec. 84). Hensey's sole asset at the time of his assignment and the secret agreement referred to was his pending chose in action at law against the Mercantile Trust Company (Rec. 59-63), this claim then in suit being for $50,000 on a surety bond in that amount (Rec. 94), Hensey claiming he had been damaged in an amount exceeding the bond (Rec. 47). The first trial of Hensey's suit against the Mercantile Trust Company resulted in a verdict by the jury in his favor for $18,250, which being set aside on a new trial a judgment was obtained in his favor for $8,468 and costs (Rec. 96), which judgment was sustained by this court in an opinion rendered April 8, 1907 (Rec. 97), the cause in this court being known as No. 245, October Term, 1906. Birney & Woodard as Hensey's & Mertens & Agnew's attorneys, claim there is due them in the cause a fee of three thousand dollars (Rec. 6, 9, 10), and Mertens & Agnew claim (its bona fides being disputed by appellants) that at the time of the assignment in October, 1903, Hensey was justly indebted to them in the sum of seven thousand three hundred dollars for brick furnished (Rec. 9), besides two hundred and fifty dollars demanded by Hensey and by Mertens & Agnew paid over to him (Rec. 46) at the time of, or prior to (Rec. 61), the execution and filing of the precipe and assignment and of the execution of the secret agreement

referred to, the aggregate of attorneys' fees and the amount found by the courts below to be due Mertens & Agnew thus exceeding the amount of the judgment, payment of which to Mertens & Agnew appellants seek to enjoin.

Appellants appeal to this court on the ground that the lower court erred in holding that the assignment to Mertens & Agnew was not fraudulent in law and, in fact, by reason of the secret reservation of a possible benefit to Hensey, the known failing debtor, appellants contending that under the conceded facts of the secret arrangement, without any explanation offered to show a reason for the secret arrangement, it was the duty of the court to annul the assignment as in fraud of creditors. The lower court found the secret arrangement to be a badge of fraud, but that there was no fraud in fact and that hence appellants' bill should be dismissed, the provisions of 13 Elizabeth applying in the District of Columbia except as modified by Statute, under the provisions of section 1120 of the Code of Laws of the District of Columbia, reading as follows:

> "Sec. 1120. Intent to Defraud Creditors.—Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or rents and profits issuing from the same, or in goods or things in action, and every charge upon the same, and every bond or other evidence of debt given, or judgment or decree suffered, with the intent to hinder, delay, or defraud creditors or other persons having just claims or demands of their lawful suits, damages, or demands, shall be void as against the persons so hindered, delayed, or defrauded; Provided, That nothing herein shall be construed to affect or impair the

title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor; Provided further, That the question of fraudulent intent shall be deemed a question of fact and not of law."

Statement of Facts and Record.

Counsel for appellants in their opening statement have set forth comprehensively but summarily the material facts that are conceded or established beyond controversy, and believe the same covers the facts essential to this court's determination, but in this statement will set forth more at length the record that establishes the conclusions of fact stated in the first pages of this brief.

The bill filed by appellants in the instant case on April 9, 1907 (Rec. 1), alleged that appellants (complainants in the trial court) as trustees had recovered on May 21, 1906, a decree against Hensey for $67,707.02, which was unpaid, and that Hensey had no property subject to execution. It averred that Hensey, on June 12, 1905, recovered a judgment in the Supreme Court of the District of Columbia, as yet unsatisfied, against the Trust Company for $8,468; that he had long been insolvent and indebted to others besides complainants; that without consideration, in whole or in part, and for the purpose of hindering, delaying and defrauding his creditors he had on March 3, 1903, assigned of record all his right, title and interest in the judgment to the defendants Mertens and Agnew; that if any amount was due Mertens and Agnew by Hensey it was below the amount of the judgment and that the entire

judgment that might be recovered had been assigned upon a secret agreement and arrangement that the assignees should repay or refund to Hensey any amount in excess of their claim. The court was asked therefore to set aside the assignment and apply the amount of the judgment in satisfaction of the claims of all Hensey's creditors. Attached to the bill were a number of interrogatories requiring all three real defendants to answer as to the amount of Merten's and Agnew's claim against Hensey and as to the agreements between them, under which the assignment was made. Messrs. Birney & Woodard, who had been attorneys for Mertens and Agnew and Hensey, in all proceedings relating to the assignments and agreement and prosecution of Hensey's claim against the Trust Company, filed a separate answer for Hensey and joint answer for Mertens and Agnew (Rec. p. 5 et seq.) Hensey admitted he was appellants' judgment debtor, and also recovery of judgment by him against the Trust Company, as did the other answer. Hensey denied he "assigned his claim against the Mercantile Trust Company to hinder, delay, or defraud his creditors," and averred it was made in good faith and for an indebtedness due by him to Mertens and Agnew of $7,300 for brick, this being the amount found due by an account stated between them in 1901, "and an additional loan by said defendant to this defendant of $250." He said that "being without means and unable to prosecute his claim for damages against the Mercantile Trust Company" he assigned his claim to Mertens and Agnew "upon agreement that from the proceeds of any judgment that might be recovered against that company attorneys' fees should first be paid, thereafter the claim of Mertens and Agnew against Hensey, and if there

should be any balance then remaining the same to be paid to this defendant." The amounts due were set forth with the statement that it would appear he (Hensey) "is entitled to receive nothing from the proceeds of the judgment against the said Mercantile Trust Company." Attached to the answers to the interrogatories to Hensey, Mertens and Agnew not answering the interrogatories propounded to them, were the subjoined two agreements, of which the first it was admitted in the evidence had been kept in the safe of Birney & Woodard until filed with the answer to appellants' bills, whereas the second had been filed with the Clerk of the Supreme Court of the District of Columbia:

(Copy.)

This agreement, entered into this twenty-first day of Otcober, 1903, between Frederick Mertens and Park Agnew, parties of the first part, and Melville D. Hensey, party of the second part.

Whereas, the party of the second part has this day executed an assignment of his cause of action against the Mercantile Trust Company, At Law No. 44,822, in the Supreme Court of the District of Columbia:

Now, therefore, it is agreed and understood between the parties that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit, or any other suit involving the same issue, that there shall first be paid costs and attorneys' fees, secondly the claim of Mertens & Agnew against Melville D. Hensey, any balance then remaining over to the said Hensey.

Witness the signatures and seals of the parties. this twenty-first day of October, 1903.

FREDERICK MERTENS.
PARK AGNEW,
MELVILLE D. HENSEY.

(Copy.)

In the Supreme Court of the District of Columbia.

At Law. No. 44822.

MELVILL D. HENSEY, Plaintiff,
vs.
MERCANTILE TRUST CO., Defendant.

WASHINGTON, D. C., *October* 21, 1903.

For value received, I hereby sell, assign, transfer and set over to Frederick Mertens and Park Agnew my cause of action in the above entitled suit, and all the proceeds which may be derived from the prosecution thereof and from any judgment that may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact.

In witness whereof, I have hereunto set my hand, this twenty-first day of October, 1903.

(Signed) MELVILLE D. HENSEY.

The joint answer of Mertens and Agnew admitted the contemporaneous making of the absolute assignment and the agreement with a reservation to Hensey's benefit. The answer stated: "They are informed that the said Hensey is insolvent but are without personal knowledge as to the truth thereof." They denied the assignment was "for the purpose of hindering, delaying, or defrauding the complainants or any one else." The Trust Company's answer admitted existence of the judgment against it. Issue was joined on the answers.

In the course of the testimony there was introduced in evidence the suit filed by Hensey as plaintiff against the

Trust Company (Rec. p. 94) claiming $50,000 and costs and a precipe as follows (Rec. 95):

Order for Entry to Use, Etc.
Filed October 20, 1903.

In the Supreme Court of the District of Columbia, the 15th day of February, 1902.

At Law, No. 44822.

Melville D. Hensey, Plaintiff,

vs.

The Mercantile Trust Company, a corporation, Defendant.

The Clerk of said court will please enter this cause to the use of Frederick Mertens and Park Agnew.

MELVILLE D. HENSEY, *Plaintiff*,
BIRNEY & WOODWARD,
Attorneys for Plaintiff.

Also a verdict, February 1, 1904, by a jury in favor of Hensey for $18,250, which was set aside, and a second verdict and judgment, sustained by this court, of $8,468 and costs.

The decree against Hensey for $67,707.02 and costs rendered May 28, 1906, by the Supreme Court of the District in favor of a syndicate of which appellants were made trustees also was proved and offered in evidence (Rec. 84) with the original bill filed by the syndicate on July 18, 1903, against Hensey charging him with gross frauds (Rec. 69), and also four unpaid judgments obtained by as many parties against Hensey (Rec. 91-94), the judgments being entered on dates between April 23, 1900, and June 11, 1901, for $250.74, $600, $700 and $400 with interest and costs, and all judgments con-

tinuing wholly unpaid. The claim of Mertens & Agnew against Hensey was not reduced to judgment.

Frederick Mertens, being called by appellants, testified that the fact that Melville Hensey was indebted to his firm of Mertens & Agnew was shown by a series of notes aggregating $7,358, which he produced (Rec. 16-18), the several notes being dated at intervals between Nov. 22, 1906, and Feb. 7, 1907, and each note being at three months from date and stamped on back renewed on the date of maturity for another three months. The notes were renewals he said, the first notes being given in 1899 (Rec. 18).

> Q. With whom did you have an account because of which these notes were given?
> A. I cannot recollect that man's name. He ran off. Kellogg was the name.
> Q. In whose name was that account kept?
> A. It was kept in Kellogg & Hensey.

Mertens testified (Rec. 19) that when Hensey started buying he was to pay cash for the brick, but when he could not pay cash, came to them and gave notes. No account was kept on the firm's books, the matter being settled every week or two by brick yard delivery slips. The firm kept mercantile accounts where they ran any accounts, but treated this as a cash transaction. He could not produce the original notes, but supposed Hensey had them. He could not tell over what period the account ran, nor the amount of brick delivered or the time of delivery or the price. He had nothing but the notes if any dispute arose between Hensey and himself. He could not tell how soon after their dealings began that Hensey ran short of money and settled with notes,

nor how long they shipped him brick. They kept a daily shipping book and turned over to Hensey the delivery slips for each load and Hensey paid them by turning over the notes. He supposed it was settled every two weeks. He could not tell how many times the notes were renewed. Witness testified (Rec. 22) that he had paid Hensey $250 for his interest in the suit "because Mr. Agnew and I had put up everything in this law suit, and before anything was done I took him down to Woodard's office and he assigned everything over to us for fighting this claim." They had to fight the claim, "because," said the witness, "as you know he (Hensey) hadn't got anything to put up." He did not think Hensey had anything when the assignment was made, and didn't suppose Hensey could have stood the costs. The $250 was given for "all of his interest that he had in the case." He did not know Hensey had other creditors and could not answer whether Hensey had any property, or whether he made any inquiries as to Hensey's affairs when the notes came back (Rec. 24). Asked if he endeavored to collect, witness said the boy didn't have the money. He understood they were sole owners of whatever Hensey might possess. "We thought the bondsman on that property was surely responsible for the material that we had put in the houses, and we bought his right and interest in the property that he had so that we would be sole owners of whatever he might possess." Mr. Woodard objected that the written agreement was the best evidence, but witness contradicted its contents, saying he supposed Mertens & Agnew would get the surplus had there been one as the result of their suit against the Mercantile Trust Company. He did not know there was a clause in the agreement that Hensey would get any-

thing above the amount of Merten's & Agnew's bill for brick, and the $250 and the costs and attorneys' fee. He did not know there was a clause in the agreement whereby the surplus would go to Melville Hensey (Rec. 29). Shown the agreement, he acknowledged his signature was to it.

Witness testified that Birney & Woodard had been the attorneys for Mertens & Agnew (Rec. 27) for ten or twelve years. He could not tell whether the firm's account against Hensey had been in Birney & Woodard's hands for a year or more before the assignment and did not know whether Hensey owed others than them or not.

> "Q. Is it not a fact that you made Bates Warren a trustee for yourself and for other creditors?"
> "A. Not as I know of."

They had put the matter of their affairs with Hensey in Birney & Woodard's hands before the assignment. "When we start in this kind of business we always go right down and get the advice of the attorneys first, and when we get that advice then we start in."

He could not recall the conversation and could not now tell how it was he came to advance Hensey the $250 (Rec. 28); it was so long ago.

> Q. Was this $250 volunteered by you or did Hensey suggest that you should give him something at this time?
> A. I cannot say.

The assignment was made in Birney & Woodard's office and he expected he was present and supposed both papers were signed the same time.

On cross-examination witness testified (Rec. 30) that the bricks were bought prior to Nov. 3, 1899. He had in Cumberland, Md., ten notes for $6,858, and Mr. Agnew in Alexandria, Va., one note for $500, and they would discount and rediscount them, getting new notes. Mr. Woodard requested witness to produce any notes given by Hensey in the past and to have a list made up (Rec. 32) of any notes which may be now discounted, bearing Hensey's signature and the endorsement of Mertens & Agnew. Appellant objected to any list, but offered to go to any place necessary for the notes themselves to be produced. Appellee produced nothing under the request.

On redirect examination (Rec. 36) witness testified that the notes he discounted with F. Mertens & Sons of Cumberland, of which firm he was a member. He, F. Mertens, took over in 1899 the notes given Mertens & Agnew by Melville Hensey. The statement from which he had been testifying as to the dates of the notes had been given him last night by his bookkeeper.

> Q. And you have an account book showing those transactions have you?
>
> A. I do not know whether we have an acount book showing that or not. We have got myself charged with advancing that much money.

Witness did not reply directly when asked how it happened if Hensey gave new notes each three months as testified, that the notes produced were not new notes, but were simply stamped renewed on the back.

Park Agnew testified (Rec. 54) that he was present when the matter of the assignments was discussed, but did not think he was when they were executed, believing

he signed at his office. Hensey's affairs then were the subject of discussion, Hensey and his brother and Mr. Woodard all being present. The details had escaped him. He could tell nothing as to how the $250 came to be paid. It was all between Hensey and Mertens, and he "did not certainly ask Mr. Mertens any questions about it." The discussion when he was there was mostly between the attorneys. "It concerned Mr. Hensey's affairs."

> Q. Did it concern his debts?
> A. I suppose that is about the only thing it concerned, but I could not swear to that.

He could not recall if any inquiry was made as to Hensey's assets. He was what you might call a silent partner in the firm of Mertens & Agnew. He knew Hensey was in some sort of financial trouble, because he owed them and was renewing, but he knew nothing about his other affairs and made no inquiry. He knew nothing about Hensey being sued for frauds he had perpetrated against a syndicate except what he had read in the Washington Post. The article, published in July, 1903, which had been read by Mr. Agnew at the time of its publication, was put in evidence (Rec. 55).

Henry F. Woodard (Rec. 44) testified that Mertens & Agnew put their claim against Hensey in his hands some time prior to the injunction suit against Warren and others, but how long he could not tell. In that suit his firm was counsel for Hensey as well as Mertens & Agnew, though Hensey paid him no fee. He could not say he at any time looked into Hensey's affairs. He knew nothing about other people also having claims against Hensey. It was so long ago he could not answer

that the suit in question developed the fact there were other creditors, and did not remember really whether he joined with the others in putting affairs in Warren's hands to see if something could not be gotten out and divided. He had not made an attempt to collect for Mertens & Agnew from Hensey prior to the assignments in controversy. Asked regarding the assignments he said everything was in the agreement. He added: "I don't think that Hensey was very much inclined to sue." He did not recollect whether Hensey's affairs were discussed. The whole thing about the $250 was "Melville Hensey wanted it and I advised Mr. Mertens to let him have it." It was advanced about the time and not prior to the assignment.

> Q. Was it understood that it was to be given him at the time he made the assignment?
>
> A. It was done.
>
> Q. And he was rather reluctant to bring the suit. Is that a fact?
>
> A. I do not think Mr. Hensey would have brought the suit. (Note: The record shows Hensey filed his suit in June, 1901 (Rec. 94), and the assignments were in October, 1903 (Rec. 8).

He did not think Hensey thought they could make the money.

> Q. The assignment where he was to keep any money over and above the amount of Mertens & Agnew's claim was not put of record, was it?
>
> A. Well, there was not any occasion to put that of record.
>
> Q. The other paper was put of record?
>
> A. Yes, sir; we put just the part of the assignment which was necessary to protect the interests

> of Mertens & Agnew. We never suspected at the time, Mr. Merillat, that there would be any money over. It never dawned on us that we would be that successful.

Eighteen thousand dollars had been once awarded, but had been promptly set aside, and they never thought they would get as much as $8,000. The suit was filed for $50,000, and they claimed over that amount of damage but were limited by the amount of the bond. Sixteen thousand dollars was claimed for overtime (note: meaning liquidated damages for delay) and the balance for omissions and defects. Like all lawyers, witness volunteered, he claimed all he could. He could not say who had directed insertion of the clause to pay Hensey any balance, but he probably wrote it.

Witness volunteered and appellants moved to strike out as irrelevant a statement "that this contract that was entered into between the parties was all done in good faith and without any intention whatever of affecting the rights of others."

Melville Hensey testified (Rec. 58) that he could not recollect what property he had in 1902; he did not know. He could not recollect whether he had any property except his claim against the Trust Company when he made the assignments. He had nothing but the clothes on his back now. He could not remember any payments on the judgments against him. It was impossible for him to state any means he had of meeting these judgments when he made the assignments or any means he had outside the claim against the Trust Company. He thought part of the $250 had been paid him prior to the assignment. "It might have been (Rec. 61) a year before—some of it. It was not all paid at one time."

He could not say just why it had been paid, but it may have had some bearing on his having the suit entered to their use. There was a discussion of the matter. "We discussed this suit and my interest in the suit and their interest in it."

> Q. In that discussion what agreement, if any, was there made as to what should be done if the suit should realize a large amount of money?
>
> A. There was a great deal of talking pro and con, and it was all centered in that agreement that is filed of record.

He was taken to Woodard's office by Mertens. Except in the case of Riley and something in the case of Ross, nothing was realized out of his property for his creditors.

Appellants offered in evidence a deed (Rec. 89), recorded Feb. 2, 1900, whereby Hensey and his wife conveyed to Bates Warren a number of lots in Washington Heights in the City of Washington, and also the fact of the filing of an injunction bill in equity (Rec. 68) on July 23, 1901, by Melville D. Hensey and Frederick Mertens and Park Agnew, trading as Mertens & Agnew, against the Mercantile Trust Company, Samuel Ross, Thomas R. Riley, Bates Warren and others, together with paragraph three of this bill (Rec. 48), which recited that certain persons, named Tulloch, being owners of twenty-one lots in Washington Heights had conveyed fifteen of the lots to one Edgar C. Kellogg in consideration that Kellogg would erect for the Tullochs six houses on the other six of the twenty-one lots, and that Kellogg thereupon had effected building loans with Ross, Riley and others as sureties for the purpose of constructing twenty-one houses on the lots, but after receiving advancements of $52,416 had abandoned the work, where-

upon the houses, all being uncompleted, had been bought in by Bates Warren, as trustee for creditors, furnishing labor and materials under an agreement with Hensey, whereby the buildings were to be finished and creditors paid, the paragraph further alleging that Mertens and Agnew had furnished brick on the credit of Kellogg and Hensey, and had due them therefor $7,300, and that they were entitled to share in proceeds of sale of the houses, having signified their willingness to sign but not having actually signed the agreement of creditors of January 24, 1900, pursuant to which Hensey and wife had deeded the houses and lots to Bates Warren.

Bates Warren testified (Rec. 65) with reference to this suit that when the property was deeded to him in trust for creditors it was subject to several trusts and under one of these a foreclosure had taken place July 27, 1901, with the result that there was no balance over the trusts realized for creditors. Among the creditors were Ross, Riley, Mertens and Agnew and others, none of whom received anything.

With reference to this matter Melville Hensey testified (Rec. 60) that some of his judgment creditors were persons whose claims were in connection with these Washington Heights houses and others arose out of other building projects (Rec. 60). "It was agreed (Rec. 63) to pool all of Kellogg's valuable property and it was bought in at auction in my name and a new loan made on it and we expected that the property would pay out, but by the falling down of one Jones, for whom the Mercantile Trust Company was surety, the property was finally sold out under the trust." Creditors, including Esher, who had a judgment against him, then started suit.

The court of first instance after hearing dismissed appellants bill (Rec. 96) and the Court of Appeals of the District affirmed the decree (Rec. 101), whereupon the present appeal to this court was prosecuted.

In connection with the opinion of the Court of Appeals, various alleged errors in whose opinion are set forth in the assignment of errors immediately following the present statement of facts, counsel for appellants desire briefly to call the attention of this court, as to a matter of which as part of its own records it may take judicial notice, to the claim of appellees in their suit against the Mercantile Trust Company which resulted in the judgment for $8,468 in Hensey's favor. In that suit, No. 245, of the October Term, 1906, of the Supreme Court of the United States, Hensey sued the Mercantile Trust Company, through Birney & Woodard, as his attorneys (Trans. Rec. No. 245, p. 2), for $50,000. Of this amount claimed as damages Hensey's replication (Rec. 7), filed by Birney & Woodard, states that $16,500 was for failure to complete the twenty-one houses within seven months from January 24, 1900, the houses not being finished until July, 1901, and William S. Jones, the contractor, for whom the Mercantile Trust Company was surety, having agreed to complete the houses (Bill of Exceptions, Rec. 26-28) for $89,250 within seven months or pay as liquidated damages for each day's delay fifty dollars per day. Hensey also claimed (Replication, Rec. 8) $43,830 for imperfections, omissions and defects in construction from what Jones' contract required, and Hensey, through Birney & Woodard, as his counsel, adduced testimony by several witnesses tending to show (Bill of Exceptions, Rec. 29) "that the difference in value of the said houses (twenty-one in number) by

reason of omissions, structural defects and defective materials was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the contract, plans and specifications." The court on the final trial instructed the jury if they found the houses were not completed until after August 24, 1900, to allow $50 per day for each day thereafter until the houses were finished (Rec. in No. 245, p. 34), and that it should find as matter of fact the loss suffered by improper or defective construction, deducting from the total found (Rec. 35) $29,032, which the Trust Company claimed by way of set-off through a plea of set-off filed (Rec. 11) on January 16, 1904, the suit having been filed July 23, 1901. The jury's verdict on this second trial was for $8,468 (Rec. 36), it having allowed Hensey according to a statement in the brief of Messrs. Birney & Woodard, at pages 13 and 14 (Brief for Defendant in Error, No. 245, October Term, 1906, Supreme Court of the United States), $21,000 for building defects, or $1,000 per house.

Assignments of Error.

1. The court below, upon the whole record, erred in affirming the decree of the Supreme Court of the District of Columbia, dismissing appellant's bill; and erred in not upon the whole record directing the Supreme Court of the District of Columbia to reverse its decree and enter a decree in said cause in favor of appellants in accordance with the prayers of appellant's bill.

2. The court below erred in holding that a secret reservation, by appellees in writing, of an expected benefit to an insolvent debtor, which the court finds to be the

fact (Rec. 102), did not vitiate as fraudulent the assignment made by Hensey to Mertens and Agnew; and in holding that mere assertion of no intent to defraud, or that there was no expectation of a benefit, were sufficient to overcome the secret reservation made (Rec. 104) and the natural and probable consequences and effect upon creditors of the absolute assignment recorded.

3. The court below erred in not holding that appellees were estopped to sue claiming damages in an amount exceeding $50,000 and thereafter contending no surplus was expected for the benefit of Hensey, known by them to be a failing debtor (Rec. 102).

4. The court below erred in assuming, *without evidence*, that "counsel might have entertained an honest doubt as to whether or not they could absolutely control the prosecution of the suit assigned, unless it appeared that their assignment was absolute" (Rec. 105-106); and the court below also erred in holding upon the mere statement of counsel interested in the outcome "that it was extremely doubtful whether there would be any overplus" (Rec. 105).

5. The court below erred in holding that "there was no place where the defeasance agreement could have been recorded" (Rec. 106), and in not holding that said defeasance agreement as well as said instrument of absolute assignment could have been recorded in the same suit, and at the same time, and also in not holding that the precipe filed in the cause to the use of Mertens & Agnew (Rec. 52) was sufficient to permit them to control the cause in which judgment was rendered and that the only purpose of the absolute assignment filed was and could be to deceive, hinder, delay and defraud the creditors of Hensey, a known failing debtor.

6. After first holding that said absolute agreement of complete assignment of date October 21, 1903, was accompanied with a defeasance agreement of the same date, the first recorded and the other not so recorded but held from record, the court below erred in not holding that said instruments together constituted a hindrance to creditors and in not holding that such instruments so resorted to by the preferred creditors charge them with intent to hinder, delay and defraud creditors, and that said assignment therefore is void in toto.

7. That the court below erred in holding that the proof showed an existing bona fide indebtedness of $7,300 on account of bricks furnished by Mertens & Agnew to Hensey (Rec. 104).

8. After first finding that, "unquestionably the taking of this absolute assignment by Mertens and Agnew from their insolvent debtor Hensey and entering into what must be considered a badge of fraud" (Rec. 104), the court below erred in holding as matter of law that a duty was imposed upon the general creditor (appellants), to inquire as to the good faith of the assignment of record, and that such conduct as above stated as in itself amounting to a badge of fraud, is excused unless the actors therein make some *additional* evasive and misleading statement, the court holding, "had any creditor solicited information on the subject and received a misleading and evasive reply, this case would be on an altogether different basis" (Rec. 105).

9. That, after finding that there was a secret agreement between the appellees whereby any surplus above costs, an attorney's fee and appellee, Mertens & Agnew's true claim against appellee Hensey was to be paid to Hensey, an insolvent debtor, contrary to the terms of

the public recorded assignment, that Hensey's claim against the Mercantile Trust Company was for $50,000, that Mertens & Agnew's claim was for only $7,300 and the attorney's fee $3,000, and that juries found verdicts for Hensey for $18,250 and $8,468, the court below erred as matter of law in holding that the following facts constitute sufficient to show said instruments to be consistent with an honest purpose, namely, "that the favored creditor did not in fact obtain enough from the suit assigned them to liquidate their claim against the debtor" (Rec. 104); that the insolvent debtor had no means to prosecute said suit (Rec. 104); that it *must have appeared* to Mertens and Agnew that there would be no overplus (Rec. 105); that other creditors, not shown to have any knowledge of said secret defeasance, but who did not inquire beyond the facts of the record, did not seek earlier to set aside said secret defeasance and attack the interest in said suit of said insolvent debtor; and "because counsel *might* have entertained an honest doubt as to whether or not they could absolutely control the prosecution of the suit assigned unless it appeared that their assignment was absolute" (Rec. 105, 106), some of said findings, as of fact, by the court below moreover having no support in the record.

10. It appearing by the record that although the appellants were creditors of the insolvent debtor Hensey prior to the date of said defeasance agreement of October 21, 1903 (Rec. 29), as will appear by their bill filed July 18, 1903 (Rec. 29), yet as it further appears by the record that a decree was not rendered in their said suit against said insolvent debtor Hensey determining the rights of the parties until May 28, 1906 (Rec. 84), from which time it will appear by said decree that they first

had the right to proceed as judgment creditors against said insolvent debtor Hensey, and at which time the original cause was pending in this court on appeal, the court below erred in holding as to these appellants as follows: That the failure of appellants earlier to solicit information as to whether or not said absolute assignment of record expressed the real truth of the transaction indicated a willlingness on the part of the appellants to refrain from action until said Mertens and Agnew as diligent creditors had prosecuted the claim assigned them to a successful issue (Rec. 105); and that the fact that for two years prior to the assignment of the claim there was nothing to prevent creditors (appellants) from instituting bankruptcy proceedings (said claim having been assigned October 21, 1903, Rec 29), "has a distinct bearing on the question as to what was the then understood (by appellants) value of that suit."

11. It appearing by the record that appellants filed their suit to recover a large sum of money from Melville D. Hensey on the ground of his misappropriation of funds and frauds on the 18th day of July, 1903 (Rec. 69, et seq.), and it further appearing by the record that said complete assignment and said defeasance agreement were executed shortly thereafter, to-wit on the 21st day of October, 1903 (Rec. 8), and it further appearing that said Mertens and Agnew had knowledge of the filing of said suit, at the time of the filing thereof (Agnew's testimony, Rec. 54 and 55), and also that at this time there were four outstanding unpaid judgments for small amounts against Hensey, the court below erred in not finding that the said Mertens and Agnew are estopped to deny that they intended the plain consequences of their own conduct, declaration and contract,

or to say that they did not expect an overplus as declared in and by said defesance agreement.

Argument.

In the instant case the record shows, without one line of attempted explanation, excuse or palliation for the secret and devious method adopted, and simply a volunteered statement by an interested party that there was no intent to defraud, a known insolvent debtor making an open arrangement with one preferred creditor, the firm of Mertens & Agnew, for protection of that preferred creditor and transfer to the firm of the entire known assets of the failing debtor, a chose in action of large amount, and, concurrently with that open arrangement, a secret contract between them inconsistent with the open arrangement and having for its purpose, apparent on the very face of the concealed and secreted contract, a reservation of benefits to the insolvent as against all his other creditors than the one preferred. Moreover, the absolute assignment and secret agreement follow close on a suit in large amount, based on gross frauds filed, to the knowledge of the preferred creditor, against the failing debtor. In other words we have the precise legal condition stated to be inhibited in Meyerberg vs. Jacobs, 40 Mo. App., 137, in these words:

> "A creditor may secure a preference of himself. But, the creditor must quit at obtaining a preference for himself. Otherwise it will be held a fraud."

The facts in the instant case show that Hensey had outstanding unpaid judgment creditors, and likewise appellants as creditors who had not obtained a judgment.

Mertens attempted to deny knowledge that Hensey had other creditors than his firm, but the record shows he and his partner, Agnew, joined with Hensey in a suit against these other creditors prior to the assignment. Two years before the assignment it thus appears Hensey and Mertens & Agnew were co-operating as against all others. The same counsel who prepared the assignment and its secret accompaniment were their counsel in the prior proceedings. Also there was admitted by Agnew knowledge, prior to the assignment and secret contract, of a suit in large amount against Hensey for gross frauds committed long prior to Mertens & Agnew's claim. Mertens' testimony furthermore was evasive, and, as to the effect of the papers he signed, squarely contradictory of their manifest intendment. The matter evidently had been canvassed between the principals and their attorney for some time prior to final consummation, and Hensey and his affairs and his debts were the subject of a discussion between all parties in the presence of their common attorney. Unless a special purpose, and that purpose deceit of creditors, were in view there was no necessity for at least one, if not two, or the papers carefully executed. A precipe directing entry of the suit of Hensey against the Mercantile Trust Company to the use of Mertens & Agnew had been prepared February 15, 1902, if the date asserted in it be correct, but was not filed until October, 1903, in which latter month, at the same time, was prepared and signed the assignment placed of record, and its secret and inconsistent companion carefully kept in the safe of the common attorney of both parties. If the date, February 15, of the precipe be not the true date that an attempt was made to have Hensey make over his $50,000 claim to

Mertens & Agnew, then the post dating adds another fraudulent and reprehensible circumstance to the transaction. If February 15 was the date the precipe was either prepared or signed, then the fact the precipe was not filed until October, and then only after an extended discussion and execution of the two other papers in evidence, shows Hensey would not transfer his claim to Mertens & Agnew except on condition they should specially engage to protect him against his other creditors. Clearly it needs no argument this was to hinder, delay and defraud creditors, especially appellants, and was so intended. That several discussions preceded the execution of the final papers appears from the testimony of Agnew, who states he was present at a discussion of Hensey's affairs and debts when all persons concerned were in attendance, but that he signed the agreement at his (Agnew's) office, the discussion being in the attorney's office. These persons had knowledge of Hensey's affairs, of his judgment creditors, and of appellant's suit in large amount for gross frauds. Common sense would have informed any person that Hensey would exert all his ingenuity to prevent persons accusing him as had appellants from recovery of money from him. In the words of Hensey, the discussion pro and con finally all was centered in the written instruments. These written instruments therefore must be held to speak the intention of the parties, and that intention the law says was what was their natural and probable consequence, namely, to induce other creditors to believe there had been a complete and full assignment to Mertens & Agnew, when in fact there had not been; in other words the assignment was with a purpose to hinder, delay and defraud creditors.

Mr. Woodard, the joint lawyer of all parties, states that Hensey was reluctant to sue, and would not have filed suit but for inducements by Mertens & Agnew. The fact is, however, Hensey's suit had been filed by Mr. Woodard two years before. Counsel submit that Hensey's reluctance was to assigning his claim. He clearly had to be induced, both by money down and contingent benefits, to permit Mertens & Agnew to become the use plaintiffs. Mr. Woodard seeks to assert there was no expectation there would be recovered more than the amount of Mertens & Agnew's claim of $7,300 plus expenses. He sued for $50,000 and admits Hensey's claim was for an even larger sum. Sixteen thousand dollars was for liquidated damages. Counsel respectfully submit that the parties are estopped to claim there was no expectation of obtaining a recovery in excess of the claim of the preferred creditor. They cannot blow hot and cold. If they believed there was not merit in excess of Mertens & Agnew's claim they committed a fraud on the trial court in their pleadings and in the evidence they adduced in support thereof. If they believe otherwise their position is equally untenable. As said in Downs vs. Downs, 23 App. D. C., 389, the party "must be held to have made his own record and he must stand by it." One claim cannot be advanced when to their advantage and another when not. If there was no expectation of any recovery in excess of Mertens & Agnew's claim, why a secret paper; why a special reservation; if all was honest why concealment; why a paper filed in court that was a fraud, an abuse of the privilege granted by the law and by the court of entry of a chose in action to another's use; why two papers and this devious method when a simple mode was open? The

whole transaction was such as to cause any honest man to make inquiry as to why and for whose benefit was this irregular proceeding taken.

The foregoing leaves out all consideration of the bona fides of Mertens & Agnew's debt. On this point we ask the careful perusal of the record. That debt is more than open to suspicion; it clearly needs explanation. Mertens says there were antecedent notes, but no one produces any; production of firm books is refused. His counsel makes a suggestion to Mr. Mertens he produce evidence of transactions antedating the recent notes, but it is not done, though the burden of proof we submit rested on him of fully proving up the debt claims. No prices are stated as to bricks sold; no details given. All that are produced are recent notes. Mertens says every three months over a course of years new notes were given, and yet the very notes produced evidence on their back that the custom was to renew and not to give new notes. The production of the secret contract in response to the specific interrogatory does not disprove an intention to hinder, delay and defraud creditors; it means merely that either through fear, doubt as to how much appellants knew, or unwillingness, all the parties were not willing to commit perjury. A false answer by one would have placed him in the power of his associates. Again it is common experience that persons may scheme to hinder, delay and defraud creditors and yet balk at the criminal act of perjury.

Counsel concede the Federal rule and that of many States permits a debtor honestly to prefer a special creditor. Aside from the effect of recent statutory enactments the Federal rule is equally well settled that a

secret reservation of a benefit to a known failing debtor is fraudulent per se and vitiates the preference.

In Lukens vs. Aird, 73 U. S. (6 Wall.), 79, this court said:

> "It is not important to inquire whether as a matter of fact the defendant had a purpose to defraud the creditors of Aird, for the fraud in this case is an inference of law on which the court is as much bound to pronounce the conveyance in question void, as to creditors, as if the fraudulent intent were directly proved. * * * The law will not permit a debtor in failing circumstances to sell his land and convey it by deed without reservation, and yet secretly reserve to himself the right to possess and enjoy it for a limited time for his own benefit. Such a transfer may be made upon a valuable consideration, but it lacks the element of good faith. For while it professes to be an absolute conveyance on its face, yet there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes. A trust thus secretly created and whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right, the right of possession, and gives to the debtor a benefit of enjoyment of that which rightfully belongs to his creditors."

In Means *vs.* Dowd, 128 U. S., 282, and Dent *vs.* Ferguson, 132 U. S., 67, the court reaffirmed this doctrine, and said that in all such cases the "law does not countenance any such transaction, but leaves both parties to the position where they have placed themselves." The position of the court that it was the secrecy of the transaction that was its vice was further evidenced in Huntley

vs. Kingman, 152 U. S., which it distinguished from Twyne's case and from Lukins *vs.* Aird, *supra,* saying: "In Twyne's case the deed was of *all* the property; was *secret*; was of *chattels* and purported to be *absolute,* yet the vendor remainder in possession." (The underscoring is the court's.) The court in Means *vs.* Dowd, *supra,* said an insolvent debtor

> "cannot reserve to himself any beneficial interest in the property assigned, or interpose any delay, or make provisions which would hinder and delay creditors from their lawful modes of prosecuting their claims."

It said the fact that the parties kept the instrument from record and secret show it was made to hinder and delay creditors. It said: *"It is unimportant that the parties may not have intended actual fraud."* The law has said the means they took is a fraud by necessary implication.

In Crawford *vs.* Neal, 144 U. S., the court said such transactions if void in part were void in toto, unless where there were several transactions they were so separate that one part may be upheld without the other. In the instant case it is all *one* transaction.

In Bamberger *vs.* Schoolfield, 160 U. S., 150, the court said a preference to a creditor would be held valid if it contain no reservation of an interest or benefit in favor of the vendor.

In Robertshaw Mfg. Co., 133 Fed., the Circuit Court considered the several Supreme Court decisions regarding assignments, and, while upholding a preference of a particular creditor, said the case must be entirely free from secret reservations. It said it is the *secrecy of the*

trust which constitutes its illegality. While the fact is not deemed by counsel vital the record clearly evidences that Hensey's suit against the Trust Company was all the property he had available for satisfaction of his creditors.

Greenleve et al. *vs.* Blum, 59 Tex., 126.

One Easterwood owing the firm of Greenleve et al., transferred to them certain goods to pay a valid debt of $5,200, with the understanding Greenleve et al. should sell the same, and that if they sold for more than his debt to Greenleve et al., they should give him the surplus and would be willing to allow him to make a settlement with his creditors.

Held:

> "That a creditor had a right to receive openly from an insolvent debtor property of the latter, even though it would prevent other creditors from enforcing their claims, and although the creditor knew he was preferred because of friendship, but that such reception of property must be for the sole purpose of securing the debt and not with any intent to cover up any part of the property or its proceeds for the benefit of the debtor to the prejudice of other creditors. * * *
>
> "The question in this case was as to whether or not the conveyances were made with intent which the law deems fraudulent. The court below held that there was a secret understanding between the agents of the appellant (Greenleve et al.) and Easterwood, that the excess, over the debts due to the appellants, of the proceeds of the goods, should be held for Easterwood, or that there was a secret trade for his benefit, and this with intent to hinder, delay and defraud his other creditors. If this was true, the conveyances were

void as to his other creditors, even thought the appellants may not have participated in the intent, for what their agents did in negotiating the transfers must be deemed, in law, their acts."

See also,

Rice *vs.* Cunningham, 116 Mass., 469;
Campbell *vs.* Davis, 85 Ala., 56;
Dean *vs.* Skinner, 42 Iowa, 418;
Connelly *vs.* Walker, 45 Penna., 454;
Neubert *vs.* Maesman, 37 Fla., 97;
Moore *vs.* Wood, 100 Ill., 451;
Beidler *vs.* Crane, 135 Ill., 98;
Jones *vs.* Gott, 10 Ind., 242;
Clark *vs.* French, 23 Me., 228;
Sidensparker *vs.* Doe, 52 Me., 481-90;
Malcolm *vs.* Hodges, 8 Md., 418;
Whedbee *vs.* Stewart, 40 Md., 420;
Franklin *vs.* Claflin, 49 Md., 24;
Smith *vs.* Conkwright, 28 Minn., 23;
Molaska Co. *vs.* Steele, 36 Mo. App., 496;
Wooten *vs.* Clark, 23 Miss., 77;
Walpole Platen Co. *vs.* Law, 10 U. S. App., 704;
Coolidge *vs.* Melvin, 42 N. H., 510;
Winkley *vs.* Hill, 9 N. H., 31;
Scott *vs.* Hartman, 26 N. J. Eq., 89-92;
Moode *vs.* Williamson, 44 N. J. Eq., 496-505;
Newell *vs.* Wagner, 1 North Dak., 69;
Mendenhall *vs.* Elwert, 36 Ogn., 375;
Bentz *vs.* Rockey, 69 Pa., 71-77;
Edwards *vs.* Dickson, 66 Tex., 614;
Humphries *vs.* Freeman, 22 Tex., 45;
Young *vs.* Heermans, 66 N. Y., 382.

The text books are to the same effect. See:

Bump. Fraud. Con., Sec. 201;
Wait Fraud. Con., Sec., 272;
Ency. Law (2d Ed.), Vol. 14, p. 248;
Cyc., Vol. 20, pp. 463-4;
Story Eq. Jur., Vol. 1, Secs. 361-62;
Kerr on Fraud and Mistake, 206-07.

The proviso to Section 1120 of the District Code that in suits to set aside conveyances or assignments as made with the intent to hinder, delay or defraud creditors "the question of fraudulent intent shall be deemed a question of fact and not of law" does not alter the Federal rule when applied to the instant case. The proviso does not abolish the cardinal doctrine of the law that parties shall be deemed to intend the natural and probable consequences of their acts.

Appellants respectfully submit that the statute so far as concerns the case at bar neither in reason nor authority warrants a departure from the settled doctrine of this court in cases where it is established that a party has taken and publicly recorded from a known failing debtor an absolute assignment of property with a secret written reservation of a possible benefit to the insolvent debtor. The statute declares fraudulent intent shall be deemed a question of fact and not of law, but when the facts show acts done and agreements made that naturally would tend to hinder, delay and defraud creditors the court must as necessarily and legitimately impute the intent to impede and thwart creditors to the proven facts as in criminal cases it holds parties to intend the natural and probable consequences of their acts. The statute does not make it essential to prove the fraudulent intent by showing that the party as a fact had stated his

act was done with fraudulent intent. The facts being proven the law draws the intent from the acts as in all other cases and refuses to listen to a party whose verbal assertion as to intent is in conflict with his acts. That the natural and probable consequence of an absolute assignment placed of record in a given cause would be to make persons interested believe the assignee had become vested with all the possible estate therein of the assignor would seem too plain for argument, and that it did so operate as to the four judgment creditors of Hensey is shown by the fact that it actually did keep off those creditors.

This court in Crawford *vs.* Neal, 144 U. S., 585, considering a statute of Oregon, identical in all material respects with the District Code provision, declared its adherence to its announced doctrine that a secret trust evidenced a fraudulent intent and could not be tolerated, saying:

> "A collusive transfer, placing the property of a debtor out of the reach of his creditors, while securing to him its beneficial enjoyment, is not to be tolerated, yet an insolvent debtor may prefer a creditor, even though the latter has knowledge of such insolvency. The effect of the preference may be to delay his other creditors, but if the transaction is in good faith and made with the intention of paying the preferred debt *and without any secret trust*, the conveyance by which the preference is effected is not fraudulent."

In Maryland, from whose laws most of the Code of the District of Columbia is taken, there is a statute similar to Section 1120 of the District Code. In Franklin *vs.* Claflin, 49 Md., 24, the court held:

> "Nothing can be more truly inconsistent with a contract of sale of chattels purporting to be absolute than the existence of a right or interest in or control over the same in the vendor. If such a reservation be secret it is evidence of collusion; if open, it tends to hinder, and delay creditors, and is legal or constructive fraud. Held, a prayer good that 'if the jury believe that notwithstanding the alleged sale by Hughes & Smith to Franklin, the vendors, or either of them, retained any interest or control over the property, the sale was void.' "

And in Farrow *vs.* Hayes, 51 Md., 505, the court said:

> "We see no ground upon which this testimony can be admitted in an action at law. If it was offered for the purpose of showing that the intention of the grantor was different from that which the law imputes to the deed as it is written, it was clearly inadmissible, for it has been settled by this court in a series of decisions that the intention must be gathered from the face of the instrument, and if the law declares such a deed void as against creditors, it matters not how the question of fraud in fact may stand. Where a conveyance by its terms operates to hinder and delay and defraud creditors, the intent to do so is imputed to the parties, and no evidence of intention can change that transaction. A different intent cannot be shown or made out by the reception of parol testimony, nor deduced from surrounding circumstances."

See also Main *vs.* Lynch, 54 Md., 672-3-671, and Whedbee *vs.* Stewart, 40 Md., 414.

New York State has a statute identical with the last proviso of section 1120 and, construing it, the highest

courts of that State have held that every party must be deemed to have intended the natural and inevitable consequences of his acts, and where his acts are voluntary and necessarily operate to defraud others, he must be deemed to have intended the fraud. The natural consequence of the absolute assignment placed of record was to induce creditors to believe Mertens & Agnew were the sole owners of Hensey's entire chose in action.

Coleman *vs.* Burr, 93 N. Y., 17:

> "The statute (R. S., 137, Sec. 4) provides that the question of fraudulent intent in cases of this character 'shall be deemed a question of fact and not of law;' and the claim is made that here there is no finding by the referee of fraudulent intent: but that on the contrary he has found the whole transaction to be fair and honest; he has, however, found facts from which the inference of fraud is inevitable, and although he has characterized the transaction as honest and fair, that does not make them innocent, nor change their essential character in the eye of the law. Mr. Burr must be deemed to have intended the natural and inevitable consequences of his acts and that was to hinder, defraud and delay his creditors."

Edgell *vs.* Hart, 9 N. Y., 13, was a case where there was a written arrangement whereby one party was to carry on a retail store in the ordinary manner, the other party retaining a mortgage lien on the whole stock with right of foreclosure on all goods then or thereafter possessed. The court said:

> "The appellant's counsel strenuously contend that inasmuch as the statute has declared that the question of fraudulent intent shall be deemed a

question of fact and not of law, the effect of the mortgage should have been left to the jury. It should be remembered that there is no question respecting the meaning of the language. The doubt if there be one is whether the law supports such an arrangement where the rights of creditors are concerned. There was no traversable question either respecting the intention of the parties. The law adjudges that they intended what the writing expresses, and it would be incompetent for either party to do so, if they were possessed of the most persuasive evidence that they designed the instrument to have a different operation from the one the law assigns to it. As it is the duty of the court to respond to the law, and as this was a pure question of law, it belonged to the judge to determine whether the action could be sustained on the mortgage. If by law it was void as to creditors, the court would be obliged to set aside the verdict affirming its validity as often as one should be rendered. The true question is, then, whether a person engaged in traffic and indebted can make a valid contract or conveyance in favor of one creditor, by which he shall possess a lien upon all the chattels which the debtor shall from time to time have on hand, allowing the latter to sell and purchase like an unqualified owner, the lien attaching only to what may be on hand at the time it is sought to be enforced. The proposition requires only to be stated to be refuted."

Thompson *vs.* Crane, 73 Fed., 327-29:

"The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact and not of law. * * * The general rule is that fraud may be shown in conveyances of property made to hinder and delay

creditors by the conduct and appearance of the parties, the details of the transaction, and the surrounding circumstances, and may be inferred when the facts and circumstances are such as to lead a reasonable man to believe that the property of a debtor has been attempted to be withdrawn from the reach of creditors. (See 39 Kans., 121; 37 W. Va., 3; 79 Mich., 355.) A voluntary deed is fraudulent by operation of law, where the facts and circumstances clearly show that existing creditors are thereby prejudiced without regard to whether there was any actual or moral fraud in the conveyance."

Minnesota's code provides that fraudulent intent shall be deemed a question of fact, and not of law (see Vase *vs.* Stickney, 19 Minn., 370), but in Hathaway *vs.* Brown, 18 Minn., 414, the court said:

"We perceive no objection in point of law to the instruction given at defendant's request. 'When any person is indebted and makes a sale or transfer of his property, or any of it, to another person with intent to hinder, delay or defraud his creditors, such sale is void as against the creditors of the person making the transfer, if it appears that the person to whom the transfer is made knows or has reasonable cause to believe that the transfer is made for the purpose of hindering, delaying or defrauding the creditors of the person making the transfer.' The sale is void, without reference to the actual intent of the purchaser. This is the law which in such cases charges him with that guilty knowledge or makes him a participator in it in the fraud, and his evidence that he did not intend to defraud any one is entirely beside the case."

Smith *vs.* Conkwright, 28 Minn., 23:

> "The conveyance of real estate by a debtor upon the understanding that the grantee shall hold it in trust for the grantor, and that as fast as the money could be realized therefrom it should be applied by the grantor to the payment of his debts, operates to hinder and defraud creditors, and it is void as against them. * * * It is objected that the conclusion of law found by the court below are not justified by the conclusions of fact, and this is the real question in the case. * * * The point is made by the counsel for the appellants that the question of fraudulent intent is one of fact, and that the court has not found specifically as a conclusion of fact that the deed was made with the intent to hinder and delay the creditors of the former. Although in cases of this kind the intent of the parties should be found as a matter of fact, yet in this case we think the intent to hinder and delay the creditors by the conveyances in question invariably follows from the facts found, touching the acts and intentions of the parties."

Moore *vs.* Wood, 100 Ill., 455:

> "Where the question is, was there a secret trust it is a question of fact, but when the fact of a secret trust is admitted or established, the fraud is an inference of law."

Palmour *vs.* Johnson, 84 Ga., 99:

> "By the Code every conveyance of real or personal estate made with intention to delay or defraud creditors if such intention be known to the party taking it is void, as against such creditors.

and either notice or grounds for reasonable suspicion will be treated as knowledge. An absolute deed made as a security for a debt is within this rule. A fraudulent conveyance cannot stand against creditors whether made to secure a debt or not. The conveyance must be made bona fide, and with no purpose known to or suspected by the creditor to hamper, and entangle the property as against other creditors for the sake of hindering or delaying them. If made partly to secure a debt and partly to hinder, delay or in any way defraud other creditors, and the creditor taking that deed has knowledge of this latter intention or grounds for reasonable suspicion, no title will pass as against the other creditors."

Conceding for purposes of argument only that the secret trust made the assignment only presumptively fraudulent and that the court below was correct in holding the transaction susceptible of explanation its conclusion was error for the explanation must be one of fact and a bare denial of intent to defraud does not overcome the presumption of fraud. The denial is not even competent evidence as to the intent.

In the instant case the court below found the secret arrangement constituted a badge of fraud and was presumptively fraudulent. If it be conceded appellants had established a prima facie case it nevertheless holds true that a prima facie case not rebutted becomes conclusive. The record shows that appellees and their common counsel were well aware of Hensey's insolvency and that they all met and engaged in a discussion of Hensey's affairs and of his debts. Mertens & Agnew were aware Hensey had been sued recently for gross frauds. Two papers were prepared and carefully executed, though one would

have sufficed for any honest purpose. One paper was recorded and made open to public inspection and the other paper by mutual consent was retained in the safe of the common attorney of all parties. With abundant opportunity to offer an explanation of facts as to why this devious course was adopted appellees make none. Their attorney simply enters a voluntary general disclaimer of intent to defraud and an equally voluntary self-serving assertion it was not dreamed by any one they would be so successful that there would be a surplus. But it is by their acts people are known and speak and not by their subsequent interested protestations. The attorneys, Birney & Woodard, Mr. Woodard being the moving spirit in the transaction, carefully prepared an absolute assignment and equally carefully an inconsistent agreement reserving any surplus to his client, Hensey. If no surplus was dreamed of, why such care and unnecessary labor to have both papers drawn, and why take the trouble to have all parties execute the secret arrangement, entailing, as it did, signature by Agnew at his office. Then why the careful preservation of the paper later in Woodard's safe. The suit was for $50,000, and the set-off which reduced the ultimate judgment by $29,032 had not even been pleaded at the time of the assignment, October 21, 1903, though the suit had been filed in June, 1901. The time penalties or liquidated damages for delay, a matter not open to much controversy as to the facts, alone amounted to $16,000. Attorney Woodard put on witnesses that omissions or defects in construction entitled Hensey to more than $40,000 additional. A verdict was had for over $18,000. Appellants respectfully submit that appellees and their counsel should not be heard to assert a surplus was not

expected. The assertion but evidences fabrication either in the present or the former cause. Appellees surely were chargeable with inquiry as to Hensey's motives in insisting on execution of a public and also a secret paper and the utmost attempts of appellant to ascertain the conversation leading up to execution of these papers met only evasion or alleged forgetfulness. Merten's and Hensey's testimony both were characterized, as the record shows, by lack of frankness on points to which their minds evidently had run at the time of the assignments. Fraudulent intent is a matter to be proved by acts and circumstances and rarely by open declarations. Unless it be necessary to prove fraud by the proclamation of the parties thereto, and their advertisement of the fact by a brass band and parade it is difficult to conceive what circumstances of fraud could be added to those in the record. As said by the lower court in Bokel *vs.* Costello, 22 App. D. C., 86: "Intention is not a subject to be proved by direct and positive testimony. It is almost always to be inferred from circumstances, and the time and circumstances of the transactions of the present case leave little or no doubt of the fraudulent purpose of the dealings."

The voluntary statement by Mr. Woodard that no fraud was intended was not competent testimony. It was volunteered and its injection into the record (Rec. 47) *immediately objected to. It constitutes appellee's only attempt to meet the prima facie case aside from the claim a surplus was not expected.*

In Whedbee *vs.* Stewart, 40 Md., 414, considering the statute making fraudulent intent a question of fact the court said: "Where a conveyance by its terms operates to hinder, delay or defraud creditors, the *intent to do so*

is imputed to the parties. The fraudulent character of the instrument is a presumption of law, not depending upon extrinsic evidence." And again in Farrow *vs.* Hayes, 51 Md., 505: "Where a conveyance by its terms operates to hinder and delay and defraud creditors, the intent to do so is imputed to the parties, and no evidence of intention can change that transaction."

Similarly in Hathaway *vs.* Brown, 18 Minn., 414, the court said: "The law in such cases charges him with that guilty knowledge or makes him a participator in it in the fraud, and his evidence that he did not intend to defraud any one is entirely beside the case."

The rule is thus laid down in 20 Cyc., 463:

> "A party to a contract shall not be permitted to testify to his secret, undisclosed intention where the effect of such testimony would be to contradict or nullify the express and definite words and acts which evidence the contract."

The position of the Court below that there was no fraudulent intention because there was no surplus and because there was in fact no necessity to defraud is equally untenable. Intent to hinder, delay and defraud creditors is the gist of the offense not success of nor necessity for the fraud.

Appellant heretofore has shown that appellees were estopped by their pleadings, testimony, admissions, and acts to assert here that no surplus was expected. But the existence or non-existence of a surplus is beside the mark in view of the express reservation of any surplus to the failing debtor Hensey. The gist of the offense is intent to hinder, delay and defraud creditors, not that in the result there was no fraud actually perpetrated successfully against creditors. It is not necessary that there

should be even a probability of a surplus or benefit to the failing debtor. It is sufficient that there has been a secret reservation of a *possible benefit or interest* to the failing debtor. And surely no one will claim that in a suit on a bond for $50,000, in which $16,000 is claimed for liquidated damages for delay in construction and $43,000 for omissions and defects, and in which $18,000 was once found by a jury, there was no *possibility* of the failing debtor having an interest where his real assignment was of only about $11,000. As stated in Bump on Fraud, Conv., Sec. 201:

> "The terms upon which the property is transferred must be free from all engagements to deliver any portion of it for the benefit or advantage of the debtor, for the law will not tolerate any contrivance whereby the debtor devotes his property to certain creditors in preference to the rest, with the *secret reservation of a possible interest* to himself." See also Curtis vs. Leavitt, 15 N. Y., 9.

The gist of the law is the intent not the outcome. The fact that in the *result* it turns out there would be no surplus for the insolvent has no bearing or importance in the matter. The law has reference to the *intent*. The principle is not affected by the fact that "the best laid plans o' mice and men gang aft agley." Fraudulent intention is no less fraudulently intended because it happens profit does not happen. The fact that the recovery finally was no more than Mertens & Agnew's claim and expenses would absorb, assuming for purposes of the argument the claim was bona fide for $7,300, interest and costs, and that Hensey could have validly preferred them cannot

alter the legal fact that the open and the secret papers were one transaction, and had for its purpose hindrance, delay and defrauding of Hensey's creditors. The arrangement made must speak as of the date of its execution; not with reference to the date and fact of the ultimate recovery.

The same likewise is true with reference to the remarks of the court below that the fact that there was no fraudulent intention in fact is to be gathered from the fact that inasmuch as the amount recovered was only $8,468 the entire amount could have been lawfully assigned to Mertens & Agnew, and that in the circumstances of the case satisfaction of their claim as consideration for assignment of Hensey's litigation against the Trust Company would not have been so inadequate as to have avoided the transaction (Rec. 105). We are not dealing with what *might have been done* but with what *was* done. There was not a lawful mode adopted but one naturally deceiving to creditors and on the record unquestionably so designed, and that we submit ends controversy and leaves no liberty for speculation as to what might have been done or what the parties might have thought, especially since this indulgence in speculation is one first advanced in appelle's brief and not fortified by anything in the record.

Billings *vs.* Russell, 101 N. Y., 231:

> "It is no answer to a transaction to say that the same result could have been accomplished by lawful proceedings taken by the voluntary action of the creditor. It was not so done. The continued possession of the premises by the debtor was here imposed as the condition of giving the security."

See also Meyerberg *vs.* Jacobs, 40 Mo. App., 137.

The suggestion of the court below that it must have appeared to Mertens & Agnew at the time the assignment was taken that it was extremely doubtful whether there would be any overplus appellants respectfully submit is without support in the facts and is equally untenable in law. As matter of law existence of serious doubt as to an overplus or secret benefit for a failing debtor would not validate a secret reservation of any overplus. An overplus was certainly possible, and a possible surplus would void the assignment, and common principles of honesty and fair dealing with courts estop Mertens & Agnew and their counsel to assert no overplus was expected when they by their pleadings and testimony adduced by themselves in support thereof, asserted more than fifty thousand dollars of actual damages *as due under contract.* Mertens & Agnew and Hensey were on the witness stand and none of them expressed any such opinion as the court states. The fact that Melville Hensey insisted on the secret reservation shows his expectation and the original verdict of the jury for $18,000 shows his expectation was not baseless. Furthermore, it was not until after the assignment was made in 1903 that the Trust Company in 1904 made its plea of set-off of $29,000 that ultimately reduced the final judgment. And inasmuch as several witnesses, produced by Mr. Woodard as counsel for Hensey and Mertens & Agnew both, swore that there was at least $42,000 due for omitted or defective construction, the fact that the jury cut the amount in half, as stated in Birney & Woodard's brief in this court, cannot be accepted either as conclusive of the impossibility or improbability of a judgment that

These are matters of record in this court in the former cause which this court will judicially notice. - Aluminick vs. Tompkins, 194 U. S. 548; Bienville Water Supply vs. Mobile, 186 U. S. 212-17.

would have caused existence of a surplus. The remarks of the court below on this point appellants submit are wholly speculative and conjectural and the statement that "'the claim was worth no more when it was assigned than when they recovered final judgment thereon" specious to a degree.

There is in the record no warrant for the assumption that the grant of a new trial after the verdict of $18,000 was rendered was because the verdict was excessive—new trials in complicated cases are more common because of errors of law by the trial judge than differences on his part with the findings of fact by the jury, the latter being peculiarly within their province.

As to the suggestion of the court below that the case would be on an altogether different basis had any creditor solicited information as to the recorded assignment and received an evasive and misleading reply appellants insist this is error and imposes a duty on unpreferred creditors and creates a coign of security for fraudulent assignors and assignees that finds no place in the Statute. The question is not what degree of diligence did the hounds display, but what was the intent of the cunning of the foxes—the intent of the latter as shown by their acts is the gist of the matter. Why should creditors assume that an unambiguous assignment duly filed in the cause was not what it purported to be and that parties had placed a false paper in the very recording house of justice? As well say to a title examiner he must in fact ask each party recording a mortgage whether the money had been loaned in fact.

Laches not being an issue in the case the statement by the Court below as to appellants and others refraining from bankruptcy proceedings against Hensey and not

joining in prosecution of the suit are not apposite and but obiter.

The court below intimates that appellants and the prior judgment creditors should have thrown Hensey into bankruptcy and that they should not set aside Merten's & Agnew's assignment now after proof of the secret agreement because they had not before judgment joined in the prosecution. The learned court, we submit, assumes a premise and then concludes with a predicate legally unsupportable, even assuming its premise. The court assumes as a fact that the four small original judgment creditors knew all along that the absolute assignment to Mertens & Agnew was meretricious and that there was a secret agreement. The record discloses the assumption is pure assumption. And if Mertens & Agnew were sole assignees why should these small creditors tender their money and aid to prosecute the suit? And, as Hensey, through Birney & Woodard, had filed the suit in 1901, why should they presume it would fail for want of costs for continued prosecution, or that Hensey could not have raised the small costs necessary to prosecution? Hensey is not willing to go to the length of the court and plead such extreme poverty, for when asked (Rec. 61) if he was unable to advance the costs of his suit he replied, "No, sir; I would not say I was unable."

As to appellants the record does not disclose that prior to affirmance of judgment by this court they knew the recorded assignment did not speak the truth, and obviously it must have been subsequent to the assignment they had any interest in the matter, for their suit against Hensey was not filed until July and Hensey's assignment was in October, his suit then being regularly

on the docket of the trial court. Appellants had no judgment or decree against Hensey until subsequent, not only to Hensey's judgment against the Trust Company, but until after that judgment had been affirmed by the Court of Appeals and the cause was on the docket of this court awaiting its turn and with no costs incumbent on Hensey or Mertens & Agnew, except the expense of a brief. Furthermore, it is submitted that it would have been obviously a vain thing for appellants to have tendered aid to Hensey in the light of the fact they accused him of gross frauds. Hensey's attitude toward them is shown even now by his unwarranted statement as to the syndicate members he defrauded (Rec. 62): "At that time I did not owe them any money, sir. I do not owe them any money morally now."

Appellants as large creditors ultimately naturally sought, suspicious as they had become of Hensey and his methods, to investigate the assignment after they were his judgment creditors, but even had they known the facts, as they did not, much prior to affirmance by this court of the judgment against the Trust Company they, having obtained their decree in May, 1906, would have been entitled to have awaited the outcome of the proceedings in this court, docketed here in April, 1906, by the losing party.

The court below, it is also submitted, has gone outside the record and entered the realm of speculation and conjecture when it says in its opinion: "Counsel might have entertained an honest doubt as to whether or not they could absolutely control the prosecution of the suit assigned unless it appeared that their assignment was absolute." The record discloses counsel was on the stand, but he gave no such testimony. Such a statement

would have accorded neither with the law or facts of this case. As counsel for Hensey, Mr. Woodard absolutely controlled the prosecution and the assignment gave him no further control. If the court refers to Mertens & Agnew controlling the suit, then the precipe filed in fact and in law gave them control. The absolute assignment and secret agreement could have but one main object, deceit of creditors and protection of Hensey; especially protection of him as against the syndicate pointing the accusing hand of fraud at him to the knowledge of Mertens & Agnew. This is the fact and the law. Ignorance of the law can excuse no one; it certainly should not excuse a lawyer.

The statement by the court below that there was no place where the defeasance agreement could have been recorded cannot receive the assent of appellants, who respectfully submit that inasmuch as the absolute assignment was recorded or filed in the cause, and to the files of which cause attaching or other creditors naturally would turn if they sought to collect on their judgments or decrees, it must be clear by the same token that the defeasance agreement likewise could have been recorded or filed in the same place or the entire matter put in one paper and that paper filed in the cause.

The court below rests as authority for its conclusion upon Muchmore v. Budd, 53 N. J. L., 369. It may be conceded that there are a few decisions of state courts which may be cited as lending more or less support to the case of appellee, but those decisions are contrary to the Federal rule and we believe even in the States themselves have not been followed, but have been treated, as cases to be distinguished on some special grounds or not followed at all. Muchmore v. Budd, *supra*, is one

of these. It was decided by a bare majority of seven to five, the dissenting justices including Chancellor McGill and Chief Justice Beasley. An examination of New Jersey reports discloses that the majority opinion was not followed in later cases, but the opinion treated as one on special facts that should make the case one not to be treated as authority.

The facts are that judgment had been obtained by one Smith against one Cunningham, and the latter's store and stock were in possession of the sheriff under Smith's levy. Cunningham, by a written bill of sale, transferred all the property owned or possessed by him to one Somerville, secretary of his principal creditors. The consideration was the payment by Somerville of Smith's judgment and costs, payemnt for a small bill of goods amounting to $67, which had just arrived at Cunningham's store from Muchmore & Son, but had not been delivered and a contemporaneous verbal agreement that Somerville should sell the goods at public or private sale for the best price he could realize and, after paying off the advances made by his company to settle Smith's judgment and the price of the last goods delivered by Muchmore & Sons, should divide the remaining proceeds among four certain named creditors, the overplus if any to be paid to Cunningham, who also was given a right to redeem the goods at any time before sale upon paying the advances made by Somerville and the amounts due the four certain named creditors. This transaction occurred Feb. 27, 1889, and the written instrument was neither acknowledged nor recorded, but immediately upon its execution and delivery to him Somerville took actual custody and possession of the goods. On March

1, 1889, Muchmore recovered a judgment for some hundreds of dollars against Cunningham and the sheriff levied upon the right, title and interest of Cunningham in the goods in Somerville's possession, but did not otherwise disturb Somerville's possession. On March 5, 1889, Budd purchased the goods at private sale from Somerville for their full value and at once took possession. He had knowledge of the levy under Muchmore's judgment of March 1st; that the sheriff had advertised the sale of Cunningham's interest therein. On March 9, 1889 the sheriff sold (p. 372) under the Muchmore levy and Muchmore bought what the sheriff sold under his execution, the sheriff selling the right, title and interest of Cunningham in the goods and chattels. On March 11th Muchmore demanded the goods and chattels from Budd without offering to redeem the same or pay the claim to secure which the bill of sale was made, and upon Budd's refusing the demand Muchmore brought suit. The majority opinion states that the bill of sale from Cunningham to Somerville was of the goods and accounts for a consideration of $1,050.38, concluded with a warranty of title and was "an absolute sale of the goods and an absolute assignment of the accounts to Somerville." The jury which tried the case found the transfer was bona fide (p. 389) and hence without actual fraudulent intent to hinder or delay creditors. The majority opinion held the transfer from Cunningham to Somerville was not a violation of the Statute of New Jersey concerning assignments for the benefit of creditors because it was a mortgage and not an assignment inasmuch as there was an equity of redemption, that it was not fraudulent *per se* as contravening the the Statute

of 13 Elizabeth on the ground that the bill of sale was not recorded and was not designed for record (p. 391) and was entirely free from any possibility of harm to creditors or of any intention to harm them and that as to whether it was fraudulent in fact the court was concluded by the verdict of the jury.

The dissenting opinion by five judges recognized (p. 398) that the purpose in view could have been effectuated by other modes than that adopted, but held that the secret parol reservation contrary to the written bill of sale avoided that instrument saying (p. 407): "The inevitable effect of bills of sale of this character is to mislead and embarrass creditors, and those who use them are therefore chargeable with a design to effect such result." The opinion clearly shows the dissent was based on the parol or secret reservation not expressed in the bill of sale. The opinion of the court below in the case at bar dismisses the dissenting opinion on the ground that the writer regarded "the question as to the reservation of the surplus as 'one of very minor importance.'" Appellant concede the reservation of the surplus was treated, as it is, of minor importance. The vice was not the *reservation* but the *secret reservation*, as shown by the following remarks in the dissenting opinion preceding the five words just quoted:

> "It would seem the dictate of common justice and public policy to require the debtor to declare in the instrument executed by him the whole of the disposition made of his effects. If he be acting honestly, he can have no motive for withholding such disclosure; if he be acting dishonestly, nothing can be more serviceable to his fraud than the absence of the trust from the written docu-

ment. Such omission leaves the unpreferred creditor in utter darkness. How is he to discover what the trust in reality is, or who are its beneficiaries? His only remedy would seem to be a bill in chancery. He looks at the bill of sale and it informs him that he has no further interest in the debtor's estate. He finds himself face to face with a bona fide purchaser. Why should the creditor, unless he has special information, look beyond such an instrument as this? Why should he suppose that a secret trust exists as a pendant to the instrument of sale? It seems to me manifest, without reference to the intention of the debtor, it must be a hindrance to the unpreferred creditors in the legal pursuit of their claims."

In the following cases in addition to those heretofore cited secret trusts have been denounced, and it has been held that while a creditor may seek to have his own claim preferred, he must do no more than by fair methods to obtain payment of his own claim, and that if he go further and secure a benefit to the failing debtor this will taint the whole transaction:

Crawford v. Kirksey, 55 Ala., 282;
Seaman v. Nolan, 68 Ala., 466;
Story v. Agnew, 2 Ill. App., 358;
Sidensparker v. Doe, 52 Me., 481-90.

The foregoing citations of authorities as to secret reservations apply to choses in actions as well as other species of property:

Code of D. C., Sec. 1120;
Ins. Co. v. Sears, 109 Mass., 383;
Green v. Tatum, 19 N. J. Eq.;

Hitt v. Ormsbee, 14 Ills., 236;
Savs. Bank v. McLean, 84 Mich., 628;
Bump on Fraud, Conv. pp. 239-40.

In argument counsel for appellees have suggested that inasmuch as appellants placed appellees and their attorney, Mr. Woodard, on the stand, they are bound by Mr. Woodard's denial of intention to hinder, delay and defraud creditors. Appellants respectfully submit, first, that they cannot be bound by an interjection of Mr. Woodard and that his denial of intention being volunteered and not responsive to any question by appellants cannot bind them; second, that the denial was not competent testimony in the case and was objected to seasonably, and third, that appellants and the court are entitled to and should treat appellees as witnesses on cross-examination. The true rule on this point was laid down by the late Mr. Justice Peckham in Becker v. Koch, 104 N. Y., 394-401, and followed by the Court of Appeals of the District of Columbia in Dumas v. Clayton, 32 App. D. C., 566, Mr. Justice Peckham holding the court below had erred because it directed a verdict for the plaintiff in a fraudulent assignment case on the ground that while there was testimony from which an inference of fraud could be drawn the defendant had called the assignor as a witness and was bound by his explanatory evidence and denial of intent to defraud. The Justice said: "The court directed a verdict for the plaintiffs, and if, therefore, there was evidence enough to authorize a submission of the question of fraud to the jury the judgment must be reversed. We think there was, and had it not been for the rule of law adopted by

the court below we believe that court would have been of the same opinion. That rule was that as the defendant called a witness by whom he attempted to prove the fraud, and as that witness denied it, the defendant was bound by that denial, in the absence of contradiction by some other witness, even though the jury might think some parts of the evidence of the witness clearly showed its existence * * *.

"The general rule prohibiting the impeachment or discrediting of a witness by the party calling him was extended too far in this case. Here was an issue of fraud in the making of an assignment by the assignor, and the defendant, in order to prove its existence, called the very man as a witness, whom he alleged was guilty of the fraud. He might well be regarded, therefore, as an adverse witness, whom the party by the exigencies of his case was obliged to call * * *.

"What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case."

Aside from the question as to whether Hensey really owe Mertens & Agnew the amount claimed, appellants ask the court to reverse the decree and opinion below. The record contains abundant evidence; however, a jury or the court as triers of the facts may find Mertens & Agnew have failed to prove their alleged debt. The only evidence of it consists of certain notes of recent date. It is claimed these notes were preceded by others,

but they are not produced. It was asserted each three months new notes were given, but the notes produced had renewed stamped on the back. No details or evidence was offered as to the amount of brick sold or price of the same. When first questioned Mertens testified the account was kept in the name of Kellogg & Hensey, but later denied having any account on his books of this transaction and refused to produce his books. It is a just inference from this that they contained something he desired not to be known. Their production could not have harmed him if he had no account with Hensey. Failure to have an account of the matter on the books is not in accord with the usual conduct of business, and was not in accord with Merten's & Agnew's custom, for they kept books of mercantile acount it was admitted. Excuse was attempted on the ground the Hensey account was treated as a cash transaction, but the evidence discloses a running debt, and, to small extent, debit account. On the stand Mertens seeks to establish his position as that of a purchaser of Hensey's entire interest in the claim, and denies any knowledge of his having other creditors, but his written agreement and the suit he and Hensey had entered both contradict him. And in his answer, and that of Hensey, the $250 is referred to as a loan, and not a purchase of the account. His counsel suggests but there is not produced the records of F. Mertens & Sons showing prior series of notes. The entire record is one of concealment of the true state of indebtedness as between Hensey and Mertens & Agnew, as the two contracts of assignment were of the true relations in which they stood to the claim against the Mercantile Trust Company. The averments of the bill as to the alleged indebtedness not being the true one, we believe are made

out by a fair preponderance of the testimony and the secret trust and reservation of benefit to a known insolvent debtor are admitted. Either avoids the assignment in toto. On all questions once the secret reservation was proved the burden was on appellees, Crawford vs. Neal, *supra*.

Respectfully submitted,

CHAS. H. MERILLAT,

MASON N. RICHARDSON,

Attorneys for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 107.

CHARLES H. MERILLAT AND MASON N. RICHARDSON, TRUSTEES, APPELLANTS,

vs.

MELVILLE D. HENSEY, MERCANTILE TRUST COMPANY, FREDERICK MERTENS, AND PARK AGNEW.

Brief for Appellee Frederick Mertens, Surviving Partner of Mertens & Agnew.

Statement of the Case.

In 1899 the appellees Mertens and Agnew, partners, sold a large quantity of brick to one Kellogg and the appellee Hensey. During that year Hensey gave his notes in payment of the brick so purchased. Those notes, which aggregated $7,300, were renewed from time to time as they matured, and the renewals are yet outstanding.

July 23, 1901, the appellee Hensey filed his suit in the Supreme Court of the District of Columbia against the Mercantile Trust Company, Law No. 44,822, to recover damages on a builder's bond of $50,000 (Rec., p. 94). *On the 15th day of February,*

1902, Melville D. Hensey, as plaintiff in that suit, signed an order directing the clerk of the court to enter same to the use of Frederick Mertens and Park Agnew. The order was filed with the clerk October 20, 1903 (Rec., p. 95), and on the following day Hensey, "for value received," assigned to Mertens and Agnew his cause of action against the trust company, and "all the proceeds which may be derived from the prosecution thereof and from any judgment that may be obtained." The papers also empowered Mertens and Agnew to continue the prosecution of the cause in Hensey's name. (Rec., p. 8). With the execution of this paper a further agreement was entered into between Hensey and Mertens and Agnew to the effect "that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit (meaning the suit at law No. 44,822) or any other suit involving the same issue, there shall first be paid costs and attorneys' fees; secondly the claim of Mertens and Agnew against Hensey, and any balance then remaining over to the said Hensey." The first of the two papers was filed in the cause and the other remained with the parties to the agreement. The action at law was tried and on the 1st day of February, 1904, a verdict was found for the plaintiff in the sum of $18,250 (Rec., p. 95). This verdict was set aside and the case tried again. The second trial resulted in a verdict of $8,468, and judgment was entered thereon June 12, 1905 (Rec., p. 95). The trust company appealed to the Court of Appeals, and thereafter to this court, where the judgment was affirmed on the 8th day of April, 1907 (Rec., p. 96).

Mercantile Trust Co. *vs.* Hensey, 205 U. S., 298.

July 18, 1903, Charles W. Richardson, and a large number of other persons, filed their bill in the Supreme Court of the District of Columbia against Thomas

G. Hensey, Mellen C. Hooker, and Melville D. Hensey (Rec., p. 69). The bill charged the defendants with certain fraudulent practices and sought an accounting. This suit resulted May 28, 1906, in a decree against the defendants (among them Melville D. Hensey) for $67,707.02 (Rec., p. 84). Charles H. Merillat and Mason N. Richardson were appointed trustees in the cause. These trustees, on April 9, 1907 (one day after the affirmance of the judgment of Hensey *vs.* Mercantile Trust Co., by this court), filed their bill in the Supreme Court of the District of Columbia against the appellees, wherein they in substance charged that the assignment of the cause of action by Hensey to Mertens and Agnew was in fraud of the complainants and others of his creditors, and *for the purpose of hindering, delaying, and defrauding them, and without consideration, in whole or in part;* that if Mertens and Agnew, or either of them, had any claim against Hensey, the true and exact amount of the indebtedness justly due was far below the amount of said judgment, and that said judgment was assigned upon a secret agreement that Mertens and Agnew should refund or repay to Hensey any overplus.

The bill recites the complainants' decree of May 21, 1906, against Melville D. Hensey and others for $67,707.02, and prays that the assignment from Hensey to Mertens and Agnew be set aside, and the amount of the judgment paid over in satisfaction of complainants' decree and of claims of other creditors. It submitted interrogatories to each defendant and required answers under oath by all save Hensey.

The answer of Hensey admits that a judgment was had against the trust company; avers that he has no interest in it, he having assigned the same on the 21st day of October, 1903, to Mertens and Agnew; that the judgment and proceeds were to be applied in accordance

with that paper. Hensey denies that the assignment was made to hinder, delay, or defraud his creditors, and avers the fact to be that it was made in good faith and for valuable consideration, to wit: An indebtedness of $7,300 to Mertens and Agnew, and an additional loan by them of $250; the answer then explains that prior to October, 1903, Hensey was indebted to Mertens and Agnew in the sum of $7,300 for brick furnished; that being without means to prosecute a claim for damages against the Mercantile Trust Company he agreed to, and did, assign his claim to Mertens and Agnew, upon agreement that from the recovery attorneys' fees should first be paid, thereafter the claim of Mertens and Agnew, and any balance then remaining to him; that the claim of Mertens and Agnew, plus interest and attorneys' fees, amounted to $12,000; that the judgment being for a less amount, he, Hensey, was without interest.

The answers of Mertens and Agnew admit the assignment by Hensey to them, deny the fraud charged in the bill, and aver that the amount due them, plus costs and attorneys' fees, was in excess of the amount of the judgment against the Mercantile Trust Company. They also deny that any secret agreement was entered into between themselves and Hensey. They set forth the consideration for the assignment to them, and state that concurrently with said paper an agreement was entered into between the parties which provided that from the proceeds of any judgment that might be recovered, the costs and attorneys' fees should be first paid; secondly, their claim, and any balance to Hensey; that they had laid out and expended large sums of money in prosecuting the suit against the trust company, and that from 1903 had litigated the claim which resulted in an affirmance by the Supreme Court of the United States, April 8, 1907; that the amount of the judgment was not sufficient to pay costs, attorneys' fees, and their claim.

The Supreme Court of the District of Columbia dismissed the bill, holding that the assignment by Hensey was on account of an honest debt; that there was no evidence of fraudulent purpose in any of the parties; and that the transaction was not constructively fraudulent.

The Court of Appeals affirmed these findings, holding:

(*a*) That Hensey was honestly indebted to Mertens and Agnew as asserted in the answers and that he had the right to prefer them above other creditors (Rec., p. 104).

(*b*) That while the agreement between them was presumptively fraudulent, such presumption was fully rebutted.

(*c*) That there being no actual fraud the assignment would not be set aside at instance of other creditors who had not been deceived or misled by it (Rec., p. 106).

NOTE.—Mr. Park Agnew, one of the appellees, has died pending the appeal to this court. His interest in the cause survives to his partner, Mr. Frederick Mertens, also an appellee.

ARGUMENT.

I.

No assignment of errors having been filed as required by sections 997 and 1012 Rev. Stat., and by the rules of this court (rules 21 and 35), appellees object to the consideration of such alleged errors as the brief of appellants' counsel may specify, and ask that they be disregarded and that the decree below be affirmed, there being certainly no "plain error."

Col. Heights Realty Co. *vs.* Rudolph et al., 217 U. S., 547.

II.

No Proof of the Actual Fraud in Fact Charged in the Bill.

As shown, the bill charges express fraud, that the assignment was made for *the purpose* of hindering, delaying, and defrauding creditors and was without consideration in whole or in part.

The trial court found this to be untrue, and the Court of Appeals expressly affirmed this finding, saying of appellees:

> "They appear to be reputable business men, and aside from the careless manner in which they dealt with Hensey there is no reason to question the *bona fides* of their claim against him" (Rec., p. 104).

The concluding paragraph of the opinion of the Court of Appeals is emphatic.

> "An honest debt existing, all fraud being denied, no actual fraud or deceit being shown and the value of the thing assigned being less than the debt, we do not believe equity requires us to deprive these diligent creditors of the fruit of their efforts" (Rec., p. 106).

We submit that two courts having found the same way upon these questions of fact, this court will accept their findings.

> Stuart *vs.* Hayden, 169 U. S., 1, 14.
> Beyer *vs.* LeFevre, 186 U. S., 114.

The Evidence.

The evidence affords no room for doubt that the statements of the answers are strictly true as to all the recited circumstances. As to the debt to secure which the assignment was made, the appellees, Mertens, Agnew, and Hensey were the only witnesses. By them it was

shown that the debt was $7,300 with interest from 1899; that it was for bricks sold Hensey and one Kellogg, and that it has never been paid, but has been carried from that time in the form of promissory notes, renewed from time to time as they matured, and some of which have been discounted by bankers. The renewal notes were produced in evidence (Rec., p. 16).

In the courts below much stress was laid upon the refusal of Mr. Mertens to produce his account books for inspection, but this refusal was only after positive testimony that there was no book account of the debt. The bricks were sold as for cash, and not upon an intended credit. Evidence of the extent of deliveries was kept on delivery slips, and these were destroyed when the settlement by notes was had (Rec., pp. 19, 20).

There is absolutely nothing in the record which could properly excite doubt of the *bona fides* of this debt to the full extent asserted. Unless suspicion be accepted in the face of proof, it must be held that Hensey owed, and yet owes Mertens and Agnew precisely as the answers assert.

It is also established that Mertens and Agnew prosecuted the suit after the assignment to them, and necessarily laid out heavy costs, the cause being tried twice at circuit, again on appeal to the Court of Appeals, and again upon writ of error from the Supreme Court. During this long litigation, and for nearly a year after they had recovered their decree against Hensey, the complainants, Richardson and Merrillat, took no action against the assignment, but on the day after the final action of this court, filed the bill in this cause, and sought to deprive Mertens and Agnew of the entire fruits of their labors, and appropriate such fruits to themselves. As against Hensey the two debts are perhaps equally meritorious, but as respects the fund produced wholly through the efforts and outlays of Mertens and Agnew,

the demand of the complainants is utterly void of equity. The only ground upon which the demand is sought to be justified in this bill is that the claim of Mertens and Agnew is false and fraudulent.

The Nature of the Assigned Obligation.

The fact that the obligation assigned was an unliquidated demand for damages, liability for any part of which was absolutely denied, distinguishes this case altogether from the cases cited by complainants to sustain their claims. This was no chattel, or promissory note, or other evidence of debt, or bank account, or anything tangible which Hensey put out of his possession. It was not a thing which most creditors would have attached for, or which could have yielded anything to them upon an attachment without a litigation from which the ordinary creditor would have shrunk.

No Fraudulent Intent in Hensey.

That Hensey had no intent to cheat his creditors and cover up his property through the assignment is shown by several facts: *First*, he transferred the demand to creditors, and not to some relative or friend, not having a just debt; and, *second*, he made no transfer of it until long after his *judgment* creditors had abundant opportunity to attach the claim if they would. The record shows that Hensey sued the Mercantile Trust Company on its $50,000 bond in July, 1901 (Rec., p. 94). The suit was in his own name and for his own benefit. There were then four judgments against him, dated, respectively, March 6, 1900; May 8, 1900; December 6, 1900, and June 11, 1901 (Rec., pp. 92, 93). None of these creditors took action in any way, and it was *more than two years* after the entering of the suit that the assignment to Mertens and Agnew was made. Is not this fact

alone a sufficient answer to the charge that Hensey intended a fraud?

No Fraudulent Purpose in the Assignees.

The suggestion that this agreement was with the purpose in Mr. Mertens and Mr. Agnew to defraud the complainants is preposterous. Neither is a relative of Hensey, or a social or business intimate. Their only connection with him is that they sold him bricks and he was in their debt. This debt they and he asserted in equity cause No. 22,483, filed July 23, 1901 (Rec., p. 68), and which was adjudicated in the Court of Appeals January 20, 1903, (*21 App., D. C., 38*), as shown by the extract from the bill at pages 49, 50, of the record. This disposes of the contention that to defraud *the complainants* this claim of indebtedness was imagined, for complainants first asserted their claim against Mr. Hensey on July 18, 1903 (Rec., p. 69), *or nearly two years after Hensey, Mertens and Agnew had publicly and openly proclaimed the fact of the indebtedness and its amount.*

It is conceded that Mr. Mertens, and perhaps Mr. Agnew, knew or had reason to believe that Hensey could not, at the time of the assignment, pay his debts, for he could not pay them. Mr. Agnew thinks also he read at one time a newspaper notice of complainants' suit against the Henseys (Rec., p. 41). Mr. Mertens did not know of that suit (Rec., p. 28) which did not ripen into final decree for nearly three years.

There are no other circumstances to even give color to the absurd contention that the assignment was intended to defraud the complainants. We repeat then, that unless suspicion is not only to take the place of, but actually overcome proofs, the court must find:

1st. There was a real debt of $7,300 and interest, sure to be increased by expenses of litigation of the assigned claim.

2d. There was no purpose in Mertens and Agnew to cheat; defraud or hinder Hensey's other creditors.

With these two facts found the decree below should be affirmed and the bill dismissed, and the complainants should not be heard upon the claim of constructive fraud, or fraud in law. False charges of the moral turpitude involved in fraud in fact are discouraged in equity, and a complainant having failed to establish such charge will not be permitted to shift his ground and obtain relief on the claim of constructive fraud.

Eyre *vs.* Potter, 15 How., 41, 56.

In *Dashiell against Grosvenor*, 27 L. R. A., 67, decided in the U. S. Circuit Court of Appeals, Fourth Circuit, in 1895, the law on this subject was reviewed by Judge Goff, Circuit Judge, in a case where the charges of fraud failed in proof, and an attempt was made to recover on other grounds. The court said:

> "The charges of fraud have been made either under an entire misconception of the facts, or of a recklessness that at least is not commendable, and should not be encouraged by an endeavor on the part of this court to relieve the complainants of the embarrassment caused thereby, by holding that they are entitled to a decree founded on some general ground of equity jurisdiction on the subject not pleaded but supposed to be included in the prayer for general relief. While equity will always relieve those who suffer from acts of fraud, it has also always required that those who seek its jurisdiction on that account shall, after having carefully scrutinized the cause of complaint, most clearly formulate the allegations of the same, and *then that they shall fully prove that which they have so alleged.*"

And quoting from *Tillinghast* vs. *Champlin, 4 R. I., 173* (67 Am. Dec., 510), the court further said:

> "In almost all these cases it will be found that the objection to relief was not that the bill did

not contain allegations sufficient to afford a basis for the inferior or secondary relief upon which the plaintiff wished to fall back, but that having mingled with those allegations imputations of personal corruption or actual fraud, he had pointed his bill only to relief upon this higher ground, and must therefore succeed upon that ground or not at all"

Fisher *vs.* Boody, 1 Curt., C. C.

III.

The Statute Law has Abolished the Theory of Constructive Fraud, and Made it Necessary that Fraud in Fact, or Dishonesty, Shall be Found in Order to Vacate a Transfer.

Section 1120 of the Code of the District of Columbia is as follows:

"Sec. 1120. *Intent to Defraud Creditors.*—Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or rents and profits issuing from the same, or in goods, or things in action, and every charge upon the same, and every bond or other evidence of debt given, or judgment or decree suffered, with the intent to hinder, delay, or defraud creditors or other persons having just claims or demands of their lawful suits, damages, or demands, shall be void as against the persons so hindered, delayed, or defrauded: *Provided,* That nothing herein shall be construed to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor: *Provided, further,* That the question of fraudulent intent shall be deemed a question of fact and not of law."

There are similar provisions in the laws of California New York, Michigan, Indiana, Wisconsin, and other

States, and wherever they have been construed, the courts have denied the right of the judge to rule a conveyance fraudulent, *unless upon its face the instrument was inconsistent with an honest purpose.* If the trial were before a jury the question of fraud would be for the jury, not for the court.

McFadden *vs.* Mitchell, 54 Calif., 628.
Babcock *vs.* Eckler, 24 N. Y., 623.
Howe Machine Co. *vs.* Claybourn, 6 Fed., 438.
Hooser *vs.* Hunt, 65 Wis., 71.

And it would seem that if any effect is to be given the proviso of Code, section 1120, it must be held to reject the contention *that a transaction perfectly honest, may, by construction of law only, be found dishonest.*

IV.

The Reservation of a Surplus to Hensey After the Payment of Expenses and the Debt Due Mertens and Agnew was Not Even Constructively Fraudulent.

Huntley vs. *Kingman Co., 152 U. S., 527,* disposes of the contention that the provision for payment of the surplus to Hensey might be regarded, even without the Code provision, as fraudulent. In that case the court reversed a judgment holding a chattel mortgage of a stock in trade fraudulent because of a reservation of the surplus to the debtor, and said, *inter alia*:

> "The tendency of courts in modern times has been not to hold instruments of this character to be fraudulent and void upon their face, unless they contain provisions plainly inconsistent with an honest purpose, or the instrument indicates with reasonable certainty that it was executed not to secure *bona fide* creditors, but to enable the debtor to continue to carry on his business under cover of another's name (p. 532). . . .

> Whatever may be the rule with regard to general assignments for the benefit of creditors, there can be no doubt that in case of chattel mortgages the reservation of a surplus to a mortgagor is only an expression of what the law would imply without a reservation, *and is no evidence of a fraudulent intent.*" (p. 537).
>
> S. P. Etheridge *vs.* Sperry, 139 U. S. 267, 271 et seq.

The decision refers with approval to *Leitch* vs. *Hollister, 4 N. Y., 211,* where the facts were almost precisely as in our case.

The bill was by a creditor of one Walker to vacate as fraudulent an assignment made by him to Hollister and others of a suit upon a building contract. While the suit was pending Walker, being indebted to Hollister et al., assigned to them the judgment that might be obtained, to—

> "be applied in paying the indebtedness to each of the above assignees in equal proportion to the amount of the respective demands against me, *and the balance to me, the said Lyman R. Walker.*"

All fraud was denied, and the only question was whether the assignment was upon its face fraudulent and void as to creditors of the assignor, because of the reservation of the balance to him.

The New York court distinguished between *a general assignment* for the benefit of creditors of a certain class with a reservation to the insolvent assignor of a surplus, and "*assignments made in good faith, of a part of a debtor's property to creditors themselves for the purpose of securing particular demands,*" and held the

latter good, and that the complainant creditor had "not been hindered or sustained any other injury than that he has been postponed to other creditors equally meritorious with himself."

The distinction thus made in *Leitch* vs. *Hollister* (and adopted by this court, between assignments in trust "where the principal motive of the person making it is to reserve or secure to himself the entire, or, at least, a part of, the beneficial use of the property," and assignments "to secure the payment of a loan of money or of an existing debt, and the express reservation, or resulting of the residuary beneficial interest in the property is a necessary incident of the conveyance in trust *and not one of its objects*," has been frequently pointed out, and it has as often been declared that in all cases of mortgage, whether created in the form of a trust or otherwise, "an express reservation of a residuary interest being nothing more than what results to the party making the assignment by operation of law will not vitiate the assignment." As already shown, this court has declared that such reservation is *not even evidence of fraud.*

Curtis *vs.* Leavitt, 15 N. Y., 127, 146, 204.
Durham *vs.* Whitehead, 21 N. Y., 131.
Camp *vs.* Thompson, 25 Minn., 175.
Didier *vs.* Patterson, 93 Virginia, 534.

In *Camp* vs. *Thompson*, the debtor gave his creditor an absolute bill of sale of lumber, *which was recorded*, and took back a writing providing that the lumber should be sold and the proceeds applied to the payment of the creditor's debt and expenses of sale, any surplus to be paid the assignor. *This paper was not recorded.* Held not fraudulent in law, and that it was for the jury to say if there was fraud in fact.

In the Virginia case cited there was an absolute assignment of a chose in action to a bank, intended to secure an existing debt and future advances, with an *understanding* that any surplus should be subject to the debtor's check. Held valid, and that the principle which condemns and declares fraudulent a conveyance under which any pecuniary benefit is reserved by the debtor—

> "does not apply where the conveyance is of a part only of the estate of the debtor, and was made in good faith for the purpose of raising money or securing one or more creditors, and the reservation is incidental and what the law would imply in the absence of such provision."

Again, complainants are necessarily driven back to their claim of *actual intent in Hensey to defraud his creditors, participated in by the assignees,* for the reason that on the face of the papers, *there is no provision which can be deemed fraudulent by necessary construction.* The only provision of the papers upon which stress is laid by complainants, is that which requires payment of a surplus to Hensey. As already shown, the doctrine endorsed by this court condemns this as evidence of fraud, and declares it entirely proper. Any other rule would make fraudulent every deposit of "collateral" with lenders of money and overthrow a universal practice in banking circles, for assignments in blank of stocks and bonds as security for debts are daily made, with agreements, expressed or implied, for payment to the borrower of any surplus to arise upon a sale.

There is then, on the face of the papers, no fraudulent provision, and if this be conceded, the plaintiffs must claim to have proved fraud dehors the writings, or the wicked purpose and intention—the moral turpitude, which their bill alleges; and this is disproved.

V.

The Fact that the Assignment was Filed while the Agreement as to Application of the Proceeds was not Filed, is not only Not Conclusive Evidence of Fraud, But, Alone, is of No Probative Force.

Aside from the disproved suspicion that no debt existed from Hensey to Mertens and Agnew, complainants, to establish their charge of fraud point only to this nonfiling of the agreement, which they assert, reserved a secret benefit to Hensey (meaning thereby the right to any surplus), inconsistent with the filed paper.

There was no statute requiring or permitting the recording of papers such as this agreement in the land records, and it would have been wholly out of place in the files of *Hensey* vs. *Mercantile Trust Co.*, for the defendant in that action had no concern in the *terms* of the transfer to Mertens and Agnew. The assignment was properly filed in the cause to show the right of Mertens and Agnew to control it, and to prevent Hensey from dismissing the action if he were so disposed. For their own protection the assignees would naturally file the assignment and entry to use, which would operate to notify the defendant of their ownership, but the file of a suit at law is not the place to deposit a contract or a defeasance of a bill of sale. They were under no obligation to other creditors so to file it.

Fechheimer *vs.* Baum, 43 Fed., 719, 726.
Blanks *vs.* Klein, 53 Fed., 436.

This court has declared that—

> "the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien upon the property."
>
> Blennerhassett *vs.* Sherman, 105 U. S., 100, 117.

In this case, unlike the Blennerhassett case, there were no false representations or deceptive practices to show that the nonfiling was for fraudulent purposes. No one was misled or deceived.

To support the contention that the omission to file this paper proves fraud complainants cite cases in great number. They entirely fail to distinguish between *general* assignments and absolute *deeds of land* with a reserved present right to the grantor on the one part, and *special* assignments of a chose in action to particular creditors on the other, and yet this distinction is recognized by most of the authorities where attention was called to it. In the general assignment the debtor professes to convey *all* his property; if, by any arrangement, *he remains owner of a part of that property*, such arrangement necessarily hinders his creditors, and renders the assignment void. So with the conveyance of land, which can be transferred only by deed, which must be recorded in order to protect the grantee from subsequent purchasers and lienees without notice. An agreement contrary to the recorded deed and which reserves a right in the land, *may* avoid it, *but this will not be true where the conveyance is intended only as security for a debt.* In this case the deed will be enforced to the extent of the secured debt.

Chickering *vs.* Hatch, 3 Sumner's R., 474.
Gaffney's Assignee *vs.* Signaigo, 1 Dillon, 158.

Reviewing the decisions of this court and some of the others quoted and cited by complainants in the Court of Appeals, we find them as follows:

Lukens *vs.* Aird, 6 Wall., 79: Absolute conveyance of land with secret reservation of the right to remain in possession two years.

Means *vs.* Dowd, 128 U. S., 282: General assignment for benefit of creditors.

Dent *vs.* Ferguson, 132 U. S., 67: Absolute conveyance of land with secret reservation of right to rents therefrom.

Crawford *vs.* Neal, 144 U. S., 585: Voluntary conveyance of land without valid consideration.

Bamberger *vs.* Schoolfield, 160 U. S., 150: If applicable at all is distinctly against complainants.

In re Robertshaw Manfg. Co., 133 Fed., 556, is distinctly against the complainants. The debtor conveyed all his property to certain creditors with intent to pay debts owing to them. He was then employed to manage the business on a salary, and it was agreed that in case the business should be wound up any surplus of assets should be paid to him. Held, a valid transfer, and that the fact that it postponed other creditors, as the debtor intended, and that the creditor aided in such intent as well as to protect himself, did not invalidate 'the transaction, in the absence of a fraudulent design.

So in the Texas case of Greenleve *vs.* Blum (59 Tex., 126), quoted from by complainants, the court found the fact of a *fraudulent design participated in by the assignees* through their agents.

Rice *vs.* Cunningham, 116 Mass., 466, was a case of conveyance of land by absolute deed where the court ruled that—

> "if *the real purpose* of the transaction was to take the property out of the reach of the creditors, and at the same time to secure some advantage to the grantor from its use, or its proceeds it would present a case of secret trust."

Dean vs. *Skinner, 42 Iowa, 418:* Conveyance of land with secret reservation of a right of use for one year without rent.

Campbell *vs.* Davis, 85 Ala., 56: Absolute conveyance of land, with secret reservation of possession, the con-

veyance being made absolute with fraudulent purpose *in both parties thereto.*

Neubert *vs.* Massman, 37 Fla., 91: Conveyance of land fraudulent in fact, grantee participating.

Connelly *vs.* Walker, 45 Pa., 449–453: Bill of sale of horses and hacks to parties who fixed no price, paid nothing, gave no credit on their debt, and who were to complete the debtor's contracts and then convert the property and account to the debtor for the proceeds and the profits from the contracts.

Moore *vs.* Wood, 100 Ill., 451: Insolvent debtor conveyed all his real and personal property to a member of his family, the only consideration (and this not expressed) being future support. Grantor continued to occupy and use the property as before.

Beidler *vs.* Crane, 135 Ill., 92: Assignment of letters patent with fraudulent purpose participated in by transferee who claimed absolute ownership by his answer, but "virtually conceded" (p. 97) in testifying that it was for security for advances made and to be made. The court said:

> "It is without doubt the rule in equity, that where a conveyance or transfer is set aside solely upon the ground that it is constructively fraudulent as to creditors, it will yet be upheld to the extent of the actual consideration and be vacated only as to the excess. Phelps *vs.* Curtis, 80 Ill., 109; Lobstein *vs.* Lehn, 120 Ill., 549" (p. 99).

The transfers were found fraudulent in fact.

Jones *vs.* Gret, 10 Ind., 242: Bill of sale in satisfaction of antecedent debt, the goods remaining in the house occupied by the assignor's wife and the assignee. Held valid, the debt being proven.

Clark *vs.* French, 23 Me., 221: The court found the bill of sale "colorable and never understood to be anything more" (p. 226).

Sidensparker *vs.* Sidensparker, 52 Me., 481: Conveyance of land by an insolvent to his son, in part consideration of future support.

Malcolm *vs.* Hodges, 8 Md., 418: General assignment for benefit of "such creditors as shall release the grantors" "with implied reservation of surplus to grantor."

Whedbee *vs* Stewart, 40 Md., 414: Presents similar state of facts to the last above case.

Franklin *vs.* Claflin & Co., 49 Md., 24, 39: Case of fraudulent sale "made for the purpose of hindering and delaying creditors," the assignors continuing to "retain an interest in and control over the property" (p. 39).

Smith *vs.* Corkwright, 28 Minn., 23: Sale of land by absolute deed to secure certain endorsements and to protect the property from forced sale by creditors, with the understanding that the grantee should hold the property in trust for his grantor and have all the benefit of money realized therefrom.

Molaska Mfg. Co. *vs.* Steele, 36 Mo. Ap., 496: Bill of sale of stock of groceries, with secret agreement that assignees were to carry on the business until they made out of it all they had put in it, including a debt due them, giving the debtor employment meantime, and then return the business and stock to him or his wife.

Worten *vs.* Clark, 23 Miss., 77: Conveyance of land held fraudulent in fact and colorable only, a conclusion inevitable from the circumstances recited.

We have not reviewed complainants' other citations, but assume they are in line with the above cases, none of which give support to complainants' theories, except so far as general expressions may *appear* to do so. They may be resolved into four distinct classes:

1. Those where the court found actual fraudulent purpose, participated in by both parties.

2. Those where the debtor retained actual control as

owner of an estate in the assigned property *contrary to his deed.*

3. Those where the consideration was future support.

4. General assignments for the benefit only of creditors who shall release.

These decisions are simply inapplicable. We are quite content to accept them in the case at bar, where the court must find that an *honest debt was intended to be secured,* and can find neither motive nor purpose in the creditor secured to cheat or defraud others.

The true doctrine is that a special assignment of a particular part of a debtor's property, the possession whereof is surrendered by the debtor will be regarded as valid in the absence of convincing proof of fraudulent design. The property passes by delivery, or the equivalent thereof. A pledge is complete without any writing.

VI.

If it Be Shown that the Conveyance, Though Absolute in Form, Was Given in Good Faith to Secure a Real Debt, it Will be Quite Immaterial that the Right to Redeem Was Not Expressed But Rests in Parol. The Conveyance Will be Upheld to the Extent of the Debt Proved.

We cite some of the decisions:

Muchmore vs. *Budd, 53 N. J. Law, 369:* Muchmore being indebted to various parties, one of them obtained a judgment. Other creditors then took from M. an absolute bill of sale upon agreement to pay the judgment, sell the property, reimburse themselves and pay their debt, and turn the balance over to M. The transaction was attacked as in fraud of other creditors. The court held the bill of sale a mortgage and applied the proceeds of sale first to its extinguishment.

Didier vs. Patterson, 93 Va., 534, heretofore cited: Patterson assigned to a trust company all money due

and to become due to him from the city for work done and materials furnished. . . . On its face the assignment was absolute. Testimony showed it was intended only as security for past and future loans. It was contended by counsel that the legal effect of the agreement constituted fraud in law. The court said actual fraud not being shown, the result is the same as if it had been provided in the assignment in terms, that the moneys due upon the monthly estimates should be applied by the assignee, when collected, to the payment of the indebtedness of Patterson to it, and the balance, if any, paid over to him. The effect of such provision would only be what the law would imply without it. The surplus would equally go to him, under the law, without such provision as well as with it. Such a stipulation does not vitiate the assignment.

This case distinguishes between a general assignment for the benefit of creditors and a special assignment. (See page 539 of the opinion.)

Chickering vs. *Hatch, 3 Sumner's Reports, 474:* A conveyance of certain premises absolute in form, but admitted by the answer in chancery to be a mortgage security merely for a certain debt, treated as a valid security to the extent of the debt.

(This case in its pleadings is not unlike the case at bar.)

Gaffney's Assignees vs. *Signaigo, 1 Dillon's C. C. Reports, 158:* Gaffney made an absolute conveyance of certain property. The bill was to set the sale aside as fraudulent. The answer admitted the conveyance, but denied the fraud, and set up that the deed was executed to secure a debt, and that the conveyance was for security only.

It was claimed by the attacking creditor that an absolute conveyance made for the purpose of securing a *bona fide* debt, with a parol understanding between the parties that the land is to be reconveyed upon payment

of the debt and interest, is void, as against creditors, especially if the grantee is aware of the existence of other creditors, and knows, or has reason to believe the grantor to be insolvent. The court said "such is not the law, and the deed is valid as a security, and may be enforced as such, unless actually or constructively fraudulent." The court then goes on to say that "this case is unlike *Lukins* vs. *Aird, 6 Wallace, 79,* where a valuable right—that of possession—was secretly reserved to the failing debtor, contrary to the terms of the deed; here there was no absolute sale in fact, and no attempt by the debtor to reserve a right, at the expense of his creditors.

In *Leitch* vs. *Hollister, 4 N. Y., 211,* the assignment was of a cause of action to pay certain debts and the surplus over to assignor. It was attacked as fraudulent. The court held it to be valid.

Bump on Fraud. Con. (4th ed., sec. 55): "Taking an absolute deed as security for money is a badge of fraud (p. 42). It is, however, merely a badge and not conclusive evidence of fraud." A large number of authorities are cited under note 1, to sustain the text.

Waite on Fraud. Con., sec. 238: "It is familiar learning that a deed absolute on its face may, despite the statute of frauds, be shown to be a mortgage, and that the relationship of mortgagee and mortgagor, with all the usual incidents may thus be established. If, however, the transfer was not devised by the debtor to defraud or delay his creditors, or if it was so designed and the trustee or mortgagee afforded no aid in carrying out the intention of the principal, the transaction is valid, though open to suspicion. . . . If no fraud was intended, the security may be enforced."

In *Smith* vs. *Onion, 19 Vt., 427,* the facts were these: Onion made two deeds to Lovell of certain real estate

for the consideration of $1,800. Lovell executed a defeasance to reconvey on payment of certain debts. *The defeasance was not recorded.* Onion also gave a bill of sale of certain personal property absolute on its face. These instruments were attacked as being void against creditors. The court treated them as a mortgage, saying, however, that the transaction was open to suspicion.

Oriental Bank vs. *Haskins,3 Met., 332*, holding that a secret trust inconsistent with the terms of a deed, while evidence of fraud, does not amount to fraud per se. *Howe Machine Co.* vs. *Claybourn, 6 Fed., 438*, holding that a secret reservation of a benefit to the grantor, does not necessarily render such conveyance fraudulent.

If the foregoing decisions state the law it is clear that the making of the absolute assignment in question as security for the debt justly owing to Mertens and Agnew was not constructively fraudulent.

The fact that the contemporaneous agreement was *put in writing,* and not left to the memory of the parties, is of itself evidence of good faith, and surely if the non-recording of a defeasance will not defeat a security in form an absolute conveyance, the *nonfiling* of the agreement in this case can not be given such effect. The mortgage defeasance might be recorded in the land records; *but for this agreement there was no place for record. It would have been wholly out of place in the files of Hensey* vs. *Mercantile Trust Co.* The *assignment* was properly filed in the cause to justify Mertens and Agnew in assuming its direction, and to prevent Hensey from dismissing the action.

With these facts found the rule to govern is that expressed in "Cyc." as follows:

> "If the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt, the transaction

is not fraudulent; and this is so although the creditor knows that the debtor is insolvent, that the transfer is of all the debtor's property, that the debtor is actuated solely by a desire to defraud his other creditors, or that the conveyance secures the debts of more than one creditor. If, however, the transfer is not in reality a preference of an actual debt, but *is a mere colorable device* to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purposes of a mere preference, so as to secure to the debtor some benefit or advantage, or unnecessarily hinder and delay other creditors, *such being the purpose of the parties*, the transfer will be held fraudulent, even though there was an actual indebtedness to be discharged or secured," etc.

Cyc., vol. 20, pp. 474, 475, 476.

It is a settled rule of equity that if an absolute conveyance be found constructively fraudulent, it will yet be sustained to the extent of the debt it was given to secure.

Cases stating and applying the rule are numerous.

Boyd *vs.* Dunlap, 1 Johns, Ch. 478.
Lobstein *vs.* Lehn, 120 Ill., 549.
Bates *vs.* McConnell, 31 Fed., 588.
Stamy *vs.* Laning, 58 Iowa, 662.
Brock *vs.* Hudson, etc., Bank, 48 N. J. Eq., 615.
Short *vs.* Tinsley, 1 Metc. (Ky.), 397.
Bartlett *vs.* Cheesbrough, 23 Nebr., 767.
Ball *vs.* Phenicie, 94 Mich., 355.
Waterbury *vs.* Sturdevant, 18 Wend., 353.

The rule followed in all these cases and in a great many more is tersely stated in the Kentucky case above cited (Short *vs.* Tinsley).

"In equity when a security or conveyance is set aside as constructively fraudulent, it is upheld

> in favor of one not guilty of any actual fraud to the extent of the actual consideration, and is vacated only as to the excess."

Since in this case the proceeds of the assigned claim are far below the debt to the assignees it will not avail the complainants even to establish constructive fraud.

We submit that in any view of the case the decree below dismissing the bill must be affirmed.

ARTHUR A. BIRNEY,
HENRY F. WOODARD,
Attorneys for Appellee Mertens, Survivor, etc.

MERILLAT *v.* HENSEY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 107. Argued March 17, 1911.—Decided May 15, 1911.

Both courts below having found that no actual fraud was intended in this case, this court considered only the question of constructive fraud.

Where, as in the District of Columbia, the assignment of a chose in action does not have to be recorded and there is no way in which constructive notice can be given, the assignment, if valid upon its face, is ineffective only in case of actual bad faith established by the facts.

Knowledge of one's own insolvency, except in cases provided by statute, does not render it illegal or criminal to prefer one creditor above another. *Huntley* v. *Kingman*, 152 U. S. 527.

The fact that the amount alleged to be due on an unliquidated chose in action is greater than the amount of the debt in payment of which it is assigned is not necessarily evidence of fraud against other creditors; and where the amount actually recovered is less than the amount of the debt this court will not disturb the finding of both courts below that there was no fraud.

Reservation to the assignor of surplus of a chose in action given in payment of a debt does not of itself constitute fraud in law. To be fraud in law the reservation must be of some pecuniary benefit to the as-

signor at the expense of creditors and a prime purpose of the conveyance. Section 1120, Code of the District of Columbia.

The assignment of a mere chose in action, not subject to legal process and of uncertain value, given to secure an honest debt, will not be set aside by this court as fraudulent in law because the surplus, if any (there actually being a deficit), was reserved to the assignors by a separate instrument, for the recording of which there was no provision, after two courts have held that the assignment was not made with intent to hinder and defraud creditors and as matter of law had no such result.

34 App. D. C. 398, affirmed.

THE facts are stated in the opinion.

Mr. Chas. H. Merillat and *Mr. Mason N. Richardson* for appellants:

While the Federal rule and those of many States permit a debtor honestly to prefer a special creditor, aside from the effect of recent statutory enactments, the Federal rule is equally well settled that a secret reservation of a benefit to a known failing debtor is fraudulent *per se* and vitiates the preference. *Lukins* v. *Aird*, 6 Wall. 79; *Means* v. *Dowd*, 128 U. S. 282; *Dent* v. *Ferguson*, 132 U. S. 67; *Huntley* v. *Kingman*, 152 U. S. 527; *Crawford* v. *Neal*, 144 U. S. 585; *Bamberger* v. *Schoolfield*, 160 U. S. 150; *In re Robertshaw Mfg. Co.*, 133 Fed. Rep. 556.

It is the secrecy of the trust which constitutes its illegality. *Greenleve* v. *Blum*, 59 Texas, 126; *Rice* v. *Cunningham*, 116 Massachusetts, 469; *Campbell* v. *Davis*, 85 Alabama, 56; *Dean* v. *Skinner*, 42 Iowa, 418; *Connelly* v. *Walker*, 45 Pa. St. 454; *Neubert* v. *Maesman*, 37 Florida, 97; *Moore* v. *Wood*, 100 Illinois, 451; *Beidler* v. *Crane*, 135 Illinois, 98; *Jones* v. *Gott*, 10 Indiana, 242; *Clark* v. *French*, 23 Maine, 228; *Sidensparker* v. *Doe*, 52 Maine, 481, 490; *Malcolm* v. *Hodges*, 8 Maryland, 418; *Whedbee* v. *Stewart*, 40 Maryland, 420; *Franklin* v. *Claflin*, 49 Maryland, 24; *Smith* v. *Conkwright*, 28 Minnesota, 23; *Molaska Co.* v. *Steele*, 36 Mo. App. 496; *Wooten* v. *Clark*, 23 Mississippi,

77; *Walpole Platen Co.* v. *Law*, 10 U. S. App. 704; *Coolidge* v. *Melvin*, 42 N. H. 510; *Winkley* v. *Hill*, 9 N. H. 31; *Scott* v. *Hartman*, 26 N. J. Eq. 89, 92; *Moode* v. *Williamson*, 44 N. J. Eq. 496, 505; *Newell* v. *Wagner*, 1 N. Dak. 69; *Mendenhall* v. *Elwert*, 36 Oregon, 375; *Bentz* v. *Rockey*, 69 Pa. St. 71, 77; *Edwards* v. *Dickson*, 66 Texas, 614; *Humphries* v. *Freeman*, 22 Texas, 45; *Young* v. *Heermans*, 66 N. Y. 382.

The text books are to the same effect. See Bump. on Fraud. Conv., § 201; Wait, Fraud. Conv., § 272; Ency. Law, 2d ed., Vol. 14, p. 248; Cyc., Vol. 20, pp. 463, 464; Story, Eq., Jur., Vol. 1, §§ 361, 362; Kerr on Fraud and Mistake, §§ 206, 207.

The proviso of § 1120 of the District Code that in suits to set aside conveyances or assignments as made with the intent to hinder, delay or defraud creditors "the question of fraudulent intent shall be deemed a question of fact and not of law" does not alter the Federal rule when applied to the instant case. The proviso does not abolish the cardinal rule that parties shall be deemed to intend the natural and probable consequences of their acts. *Crawford* v. *Neal*, 144 U. S. 585.

In Maryland, from whose laws most of the Code of the District of Columbia is taken, there is a statute similar to section 1120. In *Franklin* v. *Claflin*, 49 Maryland, 24, the court held: "Nothing can be more truly inconsistent with a contract of sale of chattels purporting to be absolute than the existence of a right or interest in or a secret reservation to be evidence of collusion"; and see *Farrow* v. *Hayes*, 51 Maryland, 505; *Main* v. *Lynch*, 54 Maryland, 671, 672, 673; *Whedbee* v. *Stewart*, 40 Maryland, 414.

New York State has a statute identical with the last proviso of § 1120 and, construing it, the highest courts of that State have held that every party must be deemed to have intended the natural and inevitable consequences of

his acts, and where his acts are voluntary and necessarily operate to defraud others, he must be deemed to have intended the fraud. *Coleman* v. *Burr*, 93 N. Y. 17; *Edgell* v. *Hart*, 9 N. Y. 13; *Thompson* v. *Crane*, 73 Fed. Rep. 327, 329.

Minnesota's code provides that fraudulent intent shall be deemed a question of fact, and not of law (see *Vase* v. *Stickney*, 19 Minnesota, 370), but see *Hathaway* v. *Brown*, 18 Minnesota, 414; see also *Moore* v. *Wood*, 100 Illinois, 455; *Palmour* v. *Johnson*, 84 Georgia, 99.

Even if the secret trust made the assignment only presumptively fraudulent and the court below was correct in holding the transaction susceptible of explanation, its conclusion was error, for the explanation must be one of fact and a bare denial of intent to defraud does not overcome the presumption of fraud. The denial is not even competent evidence as to the intent.

Secret trusts have been denounced, and while a creditor may seek to have his own claim preferred, he must do no more than by fair methods to obtain payment of his own claim; as if he goes further and secure a benefit to the failing debtor this will taint the whole transaction. *Crawford* v. *Kirksey*, 55 Alabama, 282; *Seaman* v. *Nolan*, 68 Alabama, 466; *Story* v. *Agnew*, 2 Ill. App. 358; *Sidensparker* v. *Doe*, 52 Maine, 481, 490.

These cases apply to choses in actions as well as other species of property. Code of D. C., § 1120; *Insurance Co.* v. *Sears*, 109 Massachusetts, 383; *Green* v. *Tantum*, 19 N. J. Eq. 105; *Hitt* v. *Ormsbee*, 14 Illinois, 236; *Savings Bank* v. *McLean*, 84 Michigan, 628; Bump on Fraud. Conv., 239, 240.

Mr. Arthur A. Birney and *Mr. Henry F. Woodard* for appellee:

There was no purpose in Mertens and Agnew to cheat, defraud or hinder Hensey's other creditors.

With these facts found the decree below should be affirmed and the bill dismissed, and the complainants should not be heard upon the claim of constructive fraud, or fraud in law. False charges of the moral turpitude involved in fraud in fact are discouraged in equity, and a complainant having failed to establish such charge will not be permitted to shift his ground and obtain relief on the claim of constructive fraud. *Eyre* v. *Potter*, 15 How. 41, 56; *Dashiell* v. *Grosvenor*, 27 L. R. A. 67; *Tillinghast* v. *Champlin*, 4 R. I. 173; *Fisher* v. *Boody*, 1 Curt. C. C. 206.

Section 1120, Code of Dist. of Col., has abolished constructive fraud, and made it necessary that fraud in fact, or dishonesty, shall be found in order to vacate a transfer.

There are similar provisions in the laws of California, New York, Michigan, Indiana, Wisconsin, and other States, and wherever construed, the courts have denied the right of the judge to rule a conveyance fraudulent, unless upon its face the instrument was inconsistent with an honest purpose. The question of fraud is for the jury, not for the court. *McFadden* v. *Mitchell*, 54 California, 628; *Babcock* v. *Eckler*, 24 N. Y. 623; *Howe Machine Co.* v. *Claybourn*, 6 Fed. Rep. 438; *Hooser* v. *Hunt*, 65 Wisconsin, 71. And it would seem that if any effect is to be given the proviso of section 1120, it must be held to reject the contention that a transaction perfectly honest, may, by construction of law only, be found dishonest.

The reservation of a surplus to Hensey after the payment of expenses and the debt due Mertens and Agnew was not even constructively fraudulent. *Huntley* v. *Kingman*, 152 U. S. 527; *Etheridge* v. *Sperry*, 139 U. S. 267, 271; *Leitch* v. *Hollister*, 4 N. Y. 211; and see *Curtis* v. *Leavitt*, 15 N. Y. 127, 146, 204; *Durham* v. *Whitehead*, 21 N. Y. 131; *Camp* v. *Thompson*, 25 Minnesota, 175; *Didier* v. *Patterson*, 93 Virginia, 534.

There is on the face of the papers no fraudulent pro-

vision, and if this be conceded, the plaintiffs must claim to have proved fraud *dehors* the writings, or the wicked purpose and intention—the moral turpitude, which their bill alleges; and this is disproved.

The fact that the assignment was filed while the agreement as to application of the proceeds was not filed, is not only not conclusive evidence of fraud, but, alone, is of no probative force. They were under no obligation to other creditors so to file it. *Fechheimer* v. *Baum*, 43 Fed. Rep. 719, 726; *Blanks* v. *Klein*, 53 Fed. Rep. 436; *Blennerhassett* v. *Sherman*, 105 U. S. 100. This will not be held to be fraud if the conveyance is only for security; the deed will be enforced to the extent of the secured debt. *Chickering* v. *Hatch*, 3 Sumner's R. 474; *Gaffney's Assignee* v. *Signaigo*, 1 Dillon, 158; *Worten* v. *Clark*, 23 Mississippi, 77. Complainant cites many cases, but they do not give support to complainant's theories, except so far as general expressions may appear to do so; they are simply inapplicable. They apply only where the court does not find that an honest debt was intended to be secured, and can find either motive or purpose in the creditor secured to cheat or defraud others.

A special assignment of a particular part of a debtor's property, the possession whereof is surrendered by the debtor, will be regarded as valid in the absence of convincing proof of fraudulent design. The property passes by delivery, or the equivalent thereof. A pledge is complete without any writing.

If it be shown that the conveyance, though absolute in form, was given in good faith to secure a real debt, it will be quite immaterial that the right to redeem was not expressed but rests in parol. The conveyance will be upheld to the extent of the debt proved. Cases *supra* and *Muchmore* v. *Budd*, 53 N. J. Law, 369; *Didier* v. *Patterson*, 93 Virginia, 534; Bump on Fraud. Conv., 4th ed., § 55; *Smith* v. *Onion*, 19 Vermont, 427; *Oriental Bank* v. *Haskins*,

3 Met. 332; *Howe Machine Co.* v. *Claybourn*, 6 Fed. Rep. 438; 20 Cyc. 474, 475, 476.

If an absolute conveyance be found constructively fraudulent, it will yet be sustained to the extent of the debt it was given to secure. *Boyd* v. *Dunlap*, 1 Johns. Ch. 478; *Lobstein* v. *Lehn*, 120 Illinois, 549; *Bates* v. *McConnell*, 31 Fed. Rep. 588; *Stamy* v. *Laning*, 58 Iowa, 662; *Brock* v. *Hudson &c. Bank*, 48 N. J. Eq. 615; *Short* v. *Tinsley*, 1 Metc. (Ky.) 397; *Bartlett* v. *Cheesbrough*, 23 Nebraska, 767; *Ball* v. *Phenicie*, 94 Michigan, 355; *Waterbury* v. *Sturdevant*, 18 Wend. 353.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill filed by a creditor of the defendant Hensey attacking as fraudulent an assignment by him of a certain cause of action against the defendant, the Mercantile Trust Company. The bill upon final hearing was dismissed by the trial court, and this judgment was affirmed in the Court of Appeals of the District of Columbia. From that decree an appeal has been perfected to this court.

The thing assigned was a claim for damage under an indemnity bond made by the Mercantile Trust Company upon which an action was at the time pending. The assignment was in these words:

"Washington, D. C., October 21, 1903.

For value received, I hereby sell, assign, transfer and set over to Frederick Mertens and Park Agnew my cause of action in the above entitled suit, and all the proceeds which may be derived from the prosecution thereof and from any judgment that may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact.

In witness whereof, I have hereunto set my hand, this twenty-first day of October, 1903.

(Signed) Melville D. Hensey."

The assignor took from the assignees an agreement to return to him any balance after paying the debt due to the assignees. This defeasance was in these words:

"This agreement, entered into this twenty-first day of October, 1903, between Frederick Mertens and Park Agnew, parties of the first part, and Melville D. Hensey, party of the second part.

"Whereas, the party of the second part has this day executed an assignment of his cause of action against the Mercantile Trust Company, At Law No. 44,822, in the Supreme Court of the District of Columbia:

"Now, therefore, it is agreed and understood between the parties that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit, or any other suit involving the same issue, that there shall first be paid costs and attorneys' fees, secondly the claim of Mertens and Agnew against Melville D. Hensey, and any balance then remaining over to the said Hensey.

"Witness the signatures and seals of the parties, this twenty-first day of October, 1903.

(Signed) Frederick Mertens,
Park Agnew,
Melville D. Hensey."

The assignment was filed with the clerk of the court, and the defeasance was delivered to Messrs. Birney and Woodard, the attorneys conducting the action for Hensey.

In June, 1905, there was judgment for Hensey for $8,468, which was finally affirmed by this court some two years later. Thereupon, this bill was filed by the appellants, who are judgment creditors, charging that the assignment of October 21, 1903, was made for the purpose of hindering, delaying and defrauding creditors. Both the Supreme Court and the Court of Appeals concurred in holding that the appellants had failed to show fraud, actual or constructive, and that the single purpose of the

assignment was to secure the payment of a just indebtedness to the assignees, the defendants Mertens and Agnew. After paying the attorneys' fees and court costs, the surplus is not enough to pay the debt secured in full.

In view therefore of the concurrence of both courts in finding that no actual fraud was intended, we shall pass at once to the question of constructive fraud.

Fraud in law is predicated upon the fact that the assignor took from the assignees the agreement above set out, and did not file it with the clerk of the court as he did the assignment itself.

It has been argued that the assignment was misleading as not indicating the consideration or purpose, and because not accompanied by the defeasance. But the assignment of a chose in action was not required to be recorded, and there was no way in which constructive notice might be given. The filing with the clerk was, of course, not constructive notice; the obvious purpose being to protect the assignees against the dismissal of the suit by the assignor, or the payment of the proceeds of the suit to him. Indeed on the day before the clerk was directed to "enter the case as to the use of Mertens and Agnew."

That the assignment upon its face is valid is clear. If it is ineffective as to the appellants it must be because of something behind it constituting evidence of bad faith. Are the inferences to be drawn from that evidence consistent with good faith, or do the facts indubitably establish fraud as matter of law? What are the facts from which we are to conclude as matter of law that the purpose was to hinder, delay or defraud? It is said that the assignment was not absolute, but was a transfer to secure a debt, with a reservation, by an unpublished agreement, of any balance. The honesty of the debt intended to be secured was attacked, but that this was a baseless charge is hardly doubtful, especially after two courts have adjudged the debt just. It is then said that the assignor was

at the time insolvent and intended to prefer the assignees, and that they knew it. This would be effective if bankruptcy had ensued within four months, and the trustee had sought to set it aside as a preference; but that on one side, it is neither immoral nor illegal for a failing debtor to prefer one creditor over another. *Huntley* v. *Kingman Co.*, 152 U. S. 527.

But it is said that the value of the claim assigned was far beyond the amount of the debt secured. Here again we find both lower courts disagreeing with this contention.

The thing assigned was of uncertain value. It was an action for damages upon an indemnity bond. The plaintiff made a large claim and doubtless had some of the enthusiasm usual to plaintiffs seeking damages. One jury said he should have $18,000. The court said it was too much, and set the verdict aside. Another jury said he would be compensated by a little more than $8,000. The defendant thought this a monstrous sum, and carried the case first to the Court of Appeals of the District and then to this court before the judgment stuck. The costs, attorneys' fees and interest upon the debt due the assignees more than consumed the whole, and the only question now is whether the assignees shall get a part of their debt or none.

But, it is said, that they have agreed to pay back any surplus, if any there should be after paying their debt, and that this is a reservation by the assignor of an interest in the subject assigned, which operates not as a circumstance of fraud, but as that kind of indubitable evidence which makes fraud in law.

Let us look at it. It did not show fraud in fact or law that this assignment was not an absolute sale or transfer of the chose assigned, but a mere security for an honest debt. If the claim came to nothing, the debt was unpaid. If, as proved to be the case, enough was realized to pay a part, the rest is a debt to be paid. But if there should be a

surplus, what then? If nothing had been agreed about the surplus, is there any doubt that the law would have implied a promise to account to the assignor for that surplus? Is it, then, the law that a promise made to do that which, without the promise, the law would have compelled the assignee to do, constitutes such evidence of fraud as to be fraud in law?

There are some cases which seem to hold that if one makes a general assignment to secure creditors, and inserts a clause reserving to himself any surplus, that he thereby delays his creditors who might seek that surplus until the trust should be wound up, and therefore comes under the condemnation of the statute against conveyances to hinder, delay or defraud creditors, however innocent his purpose, or the existence of a surplus. There are New York cases which seem to go so far, and perhaps others. *Goodrich* v. *Downs*, 6 Hill (N. Y.) 438; *Barney* v. *Griffin*, 2 N. Y. 365; *Curtis* v. *Leavitt*, 15 N. Y. 9, 124; *Collomb* v. *Caldwell*, 16 N. Y. 486. But the same court, in *Leitch* v. *Hollister*, 4 N. Y. 211, held that the principle did not apply to assignments in good faith "of a part of a debtor's property to creditors themselves for the purpose of securing particular demands." "The conveyance," said the New York court, "whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. Whether expressed in the instrument or left to implication, is immaterial. The assignee does not acquire the legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity. The creditor attaches that interest as the property of the debtor, and is not obliged to postpone action until the determination of any trust. He is,

therefore, neither delayed, hindered or defrauded in any legal sense."

That the mere reservation of a balance under an assignment to pay debts, one or many, is enough as matter of law to make the transaction void, whether the reservation be in or out of the instrument, has not been generally accepted. *Muchmore* v. *Budd*, 53 N. J. Law, 369, where many cases are cited, among them being *Rahn* v. *McElrath*, 6 Watts (Pa.), 151; *Floyd & Co.* v. *Smith*, 9 Oh. St. 546; *Eli* v. *Hair et al.*, 16 B. Monroe, 230; *Didier* v. *Patterson*, 93 Virginia, 534. In *Huntley* v. *Kingman Co.*, 152 U. S. 527, the New York rule is impliedly disapproved. The assignment in that case was of a stock of merchandise to a third person as trustee, to sell and pay a particular debt and "hold the remainder subject to the order of the assignor." The instrument was attacked as fraudulent in law by reason of this reservation, and the trial court instructed the jury to find for the plaintiff on account of this reservation. This court reversed the judgment, holding the charge erroneous. Mr. Justice Brown, for the court, after saying that the agreement to account to the assignor for any surplus was no more than the law would have implied, said:

"Whatever may be the rule with regard to general assignments for the benefit of creditors, there can be no doubt that, in cases of chattel mortgages (and the instrument in question, by whatever name it may be called, is in reality a chattel mortgage), the reservation of a surplus to the mortgagor is only an expression of what the law would imply without a reservation, and is no evidence of a fraudulent intent. This was the ruling of the Court of Appeals of New York in *Leitch* v. *Hollister*, 4 N. Y. 211, 216, where the assignment was to the creditors themselves for the purpose of securing their demands. 'A trust,' said the court, 'as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the

assignment. Whether expressed in the instrument or left to implication, is immaterial. The assignee does not acquire the entire legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity.' "

The reservation which the law pronounces fraudulent is of some pecuniary benefit at the expense of creditors, especially when secretly secured—such benefit to the assignor being presumed a prime purpose of the conveyance. *Lukins* v. *Aird*, 6 Wall. 79. Other cases are considered and reviewed in *Huntley* v. *Kingman*, *supra*.

Section 1120 of the District of Columbia Code provides that in suits to set aside transfers or assignments as made with intent to hinder, delay or defraud creditors, "the question of fraudulent intent shall be deemed a question of fact and not of law."

Counsel have argued, as courts have ruled, that no amount of evidence will assign to an instrument an operation which the law does not assign to it. Thus a mere deed of gift which actually deprives existing creditors of property which was subject to their claims, or a transfer of property grossly disproportioned to a debt secured under a conveyance apparently absolute, but subject to a secret agreement that the surplus should be held for the assignor, could not be saved, for the necessary legal effect would be to hinder, delay or defraud creditors, and the law could but assign to such conveyance the intent which must indubitably appear from the facts. *Edgell* v. *Hart*, 9 N. Y. 213, 217.

But the assignment here was of a mere chose in action, not subject to legal process, but to be reached through equity only. There was no requirement of law that such an assignment should be recorded and no legal way to give constructive notice. The debt secured was an honest

one, and the security was of uncertain value and character, involving great expense and delay in collection. The fact that the reservation of any surplus after paying the debt secured was not disclosed in the assignment itself was a circumstance of suspicious character, but not as matter of law inconsistent with an honest intent. Two courts have held that under all the circumstances the assignment was not made to hinder, delay or defraud creditors, and as matter of law had no such result.

We are content to affirm this judgment.

Affirmed.